Petition

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

STEN THORDARSON, MARTIN FRY, CRAIG DUNBAR, MARTIN SALGADO, and CHARLES WISE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

In the absence of explicit statutory language and a clear expression of Congressional intent to expand Federal criminal jurisdiction and to encroach upon the criminal jurisdiction of the States, do acts done in furtherance of legitimate labor goals violate Federal criminal law?

In light of the comprehensive statutory and administrative scheme enacted by Congress to protect the rights of unions and union members pursuing legitimate labor goals, are acts done to secure bona fide collective-bargaining objectives cognizable under Federal criminal laws as well as Federal labor laws?

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The May 20, 1981 Opinion of the United States Court of Appeals for the Ninth Circuit is contained in Appendix "A". It is published as United States v. Thordarson, et al., 646 F.2d 1323 (9th Cir. 1981).

The March 17, 1980 Opinion of the United States District Court for the Central District of California is contained in Appendix "B". It is published as United States v. Thordarson, et al., 487 F.Supp. 991 (C.D. Cal. 1980).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 20, 1981. An Order denying a petition for rehearing and rejecting a suggestion for rehearing en banc was entered on August 5, 1981. That Order is contained in Appendix "C".

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 21.1(f), United States Supreme Court Rules, the statutory provisions which this case involves are set forth in Appendix "D". Those provisions are:

1. 18 U.S.C. §844(i): Damage by Explosives to Vehicles (Appendix "D", page 118);

2. 18 U.S.C. §1951: Interference with Commerce by Threats or Violence (App. D, pp 118-119);

3. 18 U.S.C. §1952: Interstate Transportation in Aid of Racketeering Enterprises (App. D, p. 120-121);

4. 18 U.S.C. §1961(1)-(5); Definitions - Racketeer Influenced and Corrupt Organizations ("R.I.C.O.") (App. D, p. 121-3);

5. 18 U.S.C. §1962(c) and (d); Prohibited Activities (R.I.C.O.) (App. D, p.123);

6. 18 U.S.C. §1963: Criminal Penalties (R.I.C.O.) (App. D, p. 123);

7. 18 U.S.C. §1964: Civil Remedies (R.I.C.O.) (App. D, pp 125-6);

8. 29 U.S.C. §151: Findings and Declaration of Policy (National Labor Relations Act of 1947) ("N.L.R.A.") (App. D, pp 126-128);

9. 29 U.S.C. §152(9): Definitions (N.L.R.A.) (App. D, p. 128);

10. 29 U.S.C. §157: Rights of Employees as to Organization, Collective Bargaining, etc. (N.L.R.A.) (App. D,pp 128-9);

11. 29 U.S.C. §401: Congressional Declaration of Findings, Purposes, and Policy (Labor-Management Reporting and Disclosure Act of 1959) (App. D,pp 129-130);

12. 29 U.S.C. §501: Fiduciary Responsibility of Officers of Labor Organizations (App. D, pp 131-133).

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

On November 20, 1979, a Federal Grand Jury for the Central District of California returned a ten count Indictment in the present case. (Clerk's Record, "CR", Docket Control Number 1) A copy of the Indictment is contained in Appendix "E".

The Indictment charged the five petitioners, each of whom is an officer or employee of the Teamsters Union, with being an "enterprise" engaged in a pattern of racketeering activity. It was thus alleged that the petitioners had taken part in a racketeering conspiracy in violation of 18 U.S.C. §1962(d), the Racketeer Influenced and Corrupt Organizations statute ("R.I.C.O."). (Appendix E, pp 134-7)

The Indictment, which alleged that the petitioners were engaged in an effort to unionize employees of a moving and storage

company, also charged violations of 18 U.S.C. §1952, Interstate Transportation in Aid of Racketeering Enterprises (the "Travel Act"); 18 U.S.C. §844(i), Damage by Explosives to Vehicles; and 29 U.S.C. §501(c), Embezzlement of Union Funds. (Id.)

On January 21, 1980, a hearing was held on petitioners' motion to dismiss the Indictment for failure to state offenses under Federal Law (CR 54; Reporter's Transcript, "RT", January 21, 1980).

On March 17, 1980, the District Court filed an Opinion and Order dismissing the Indictment. (CR 76; Appendix "B") Judgments of Discharge as to each petitioner were filed on the same day. (CR 76)

On April 9, 1980, under the authority of 18 U.S.C. §3731, the Government appealed to the Court of Appeals for the Ninth Circuit. (CR 77)

On May 20, 1981, the Opinion of the Court of Appeals was entered. (Appendix "A") With one Judge dissenting, the Court of Appeals reversed the District Court's dismissal of the counts of the Indictment charging violations of the R.I.C.O. statute, the Travel Act and the explosives statute. (Appendix A, pp 20, 69)

The Court of Appeals, holding that the allegations in the Indictment were sufficient, also reversed the District Court's dismissal of the counts of the Indictment charging violations of the embezzlement statute, 29 U.S.C. §501(c). (Appendix A, pp 22, 69)

A petition for rehearing was denied on August 5, 1981. (Appendix "C")[1/]

1/ The names of all parties to the proceeding in the Court of Appeals are contained in the caption of the present Petition.

B. STATEMENT OF FACTS

Between approximately July 1, 1978 and December 1, 1978, two Local Unions of the International Brotherhood of Teamsters sought to unionize employees of Redman Moving and Storage Company, Thousand Oaks, California ("Redman"). (CR 1, [Indictment] pp 1-3; Id. Appendix E, pp 134-7)

Local 186, aided by Local 389, sought to induce Redman into recognizing the Teamsters Union. Redman employees had elected Local 186 as their bargaining agent. The election had been certified by the National Labor Relations Board. In July 1978, after Redman had refused to recognize the Teamsters as bargaining agent, Local 186 ordered a strike against Redman. (Id.; RT 12-13)

During the course of this lawful strike, the acts alleged in the Indictment purportedly took place. To induce Redman

into recognizing the union, three trucks were purportedly damaged or destroyed, and plans to destroy another truck were allegedly made. (Appendix E, pp 137-9)

In attempting to induce Redman into recognizing the Teamsters, expenses were incurred by the Locals and by certain of their members. (Appendix E, p 139) Payment of or reimbursement for these expenses by the Locals was charged as embezzlement of union funds in the Indictment. These disbursements were also alleged to be part of the "pattern of racketeering activity" charged in the R.I.C.O. count. (Id.)

Certain defendants charged gasoline purchases for the vehicles which they were using on union credit cards. Seven gasoline purchases ranging in the amount from $5.00 to $14.00 were alleged. The credit card bills were paid by the Locals. (Id. at 151-165)

Telephone calls were charged to union telephone credit cards, the monthly bills for which were paid by the Locals. Other expenses incurred in connection with efforts to unionize Redman, including automobile and airplane rental expenses, were paid for or reimbursed by the Locals. (Id.)

All such expenses were incurred in connection with the Locals' attempt to unionize Redman (Id. 139) The constitution of each Local authorized payment of or reimbursement for such expenses. (Appendix B p.99 and n.13, p 111) The Indictment suggests that the use of union funds had been authorized for these expenses. (Appendix E, pp 151-165) The funds were not converted to the personal use of any defendant or any other person. (RT 8-9; CR 58, pp 1-2)

ARGUMENT

A. THE RATIONALE ANIMATING UNITED STATES v. ENMONS, 410 U.S. 396 (1973) PRECLUDES APPLICATION OF THE FEDERAL CRIMINAL LAWS CHARGED IN THIS CASE TO ACTS DONE IN FURTHERANCE OF A LEGITIMATE LABOR DISPUTE

In 1973, this Court was asked to determine whether the Hobbs Act, 18 U.S.C. § 1951, proscribed ". . . violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective-bargaining demands." United States v. Enmons, 410 U.S. 396, 399 (1973).

The Court rejected the application of the Hobbs Act to acts of violence committed by union members to secure a collective-bargaining agreement. The violent acts, directed at a utility company, included blowing up a transformer

substation owned by the company and firing high-powered rifles at company transformers. Id. at 398. Among other things, the Court held that violence to achieve legitimate union objectives was not covered by the extortion provision of the Hobbs Act, because there could have been no "wrongful" taking of the employer's property. Id. at 400.

In the present case, the Government again seeks to prosecute union members for extortionate acts committed during the course of and in furtherance of a lawful labor dispute which had as its objective the attainment of a legitimate collective-bargaining agreement. This time, instead of using the Hobbs Act, the Government is employing different Federal criminal statutes to accomplish the same result. The Government, by attempting to evade the dictates of Enmons, supra,

while ignoring the carefully crafted limitations of Federal labor law, is once more seeking to expand Federal criminal jurisdiction.

In Enmons, supra, following an analysis of the pertinent legislative history, the Court concluded that Congress had not intended to exercise its power to reach the acts of violence charged. Id. at 410; see Id. at 413 (Mr. Justice Blackmun, concurring). The Court noted that the Government's interpretation of the Hobbs Act:

> ". . . would cover all overtly coercive conduct in the course of an economic strike, obstructing, delaying, or affecting commerce. The worker who threw a punch on a picket line, or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of 20 years' imprisonment and a $10,000 fine." Id. at 410.

Finally, the Court held that, for

two reasons related to its construction of the term "wrongful," the Hobbs Act could not properly be expanded in the manner sought by the Government, ". . . [e]ven if the language and history of the Act were less clear than we have found them to be. . . ." Id. at 411. The Court first stated that a criminal statute such as the Hobbs Act must be strictly construed and any ambiguity resolved in favor of lenity. Id.

The Court then addressed itself to the same important questions of Federal criminal and labor law presented by the present case. In rejecting the Government's attempt to bring about a major expansion of Federal criminal jurisdiction, the Court stated:

> "Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress in-

> tended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States. [citations omitted]" Id. at 411.

Once again, the Government asks this Court to thrust the Federal Government into the business of ". . . policing the orderly conduct of strikes." Id. By charging acts of vandalism which amount to extortion in a legitimate labor context under sections of Federal criminal law other than the Hobbs Act, the Government again seeks to make the Federal Courts the arbiter of disputes historically left to the criminal jurisdiction of the States. Id. at 410, 411-412.

The petitioners are charged with

violations of the Racketeer Influenced and Corrupt Organizations statute ("R.I.C.O."), 18 U.S.C. § 1962(d); the statute prohibiting Interstate Travel in Aid of Racketeering (the "Travel Act"), 18 U.S.C. § 1952; the Damage by Explosives to Vehicles, 18 U.S.C. § 844(i); and Embezzlement of Union Funds, 29 U.S.C. § 501(c), for acts done to induce an employer into recognizing their union. (Appendix E [Indictment], pp 136-7) Thus, in an effort to skirt the proscriptions of Enmons and the dictates of the National Labor Relations Act, the Government has employed different statutes to accomplish the same objective sought in Enmons.

B. THE INDICTMENT IMPROPERLY INTRUDES INTO A FEDERALLY PROTECTED AREA

During the period of time covered by the Indictment, two Locals of the International Brotherhood of Teamsters "sought

to unionize Redman [Moving and Storage Company] employees." (Appendix E [Indictment], p 135) In an effort to unionize Redman, the Locals employed both organizational efforts and a strike. Both the strike and its objectives were legal, and the union's activities were protected under a comprehensive Federal statutory scheme.

Through numerous pieces of legislation, including the National Labor Relations Act, Congress has established a comprehensive statutory and administrative scheme to protect the rights of unions and union members pursuing legitimate labor objectives. Such legislation underscores the significance which Congress attributes to the labor movement. It was the clear intent of Congress that Federal labor law or State criminal and civil proceedings be employed to

police events occurring during efforts to achieve legitimate labor objectives. United States v. Enmons, supra, 410 U.S. at 411; United States v. DeLaurentis, 491 F.2d 208, 211, 214 (2nd Cir. 1974).

The National Labor Relations Act of 1947 (the "Act") first discusses the burdens on and obstructions to interstate commerce caused by "strikes and other forms of industrial strife or unrest..." Section One of the Act then goes on to state that:

> "It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection."
> 29 U.S.C. § 151

The Act goes on to create the National Labor Relations Board, 29 U.S.C. § 153; to set forth the rights of employees, 29 U.S.C. § 157; to define unfair labor practices of both employers and unions, 29 U.S.C. § 158; and to set forth the terms for the selection of labor representatives by employees, 29 U.S.C. § 159. It is highly significant to note that nowhere in this exhaustive scheme of Federal labor legislation does Congress make a criminal act committed as part of a labor dispute a Federal offense. United States v. DeLaurentis, supra, 491 F.2d at 212-213.

Labor unions are by their very nature involved in organizational activity which includes economic coercion. The Act acknowledges that coercion brought to bear in an effort to induce an employer into recognizing a union has a substantial

effect upon interstate commerce. Absent specific Congressional intent, the use of coercive tactics to obtain legitimate labor objectives is beyond the reach of Federal criminal law. United States v. Quinn, 514 F.2d 1250, 1257 (5th Cir. 1975), cert. denied 424 U.S. 955 (1976); cf. United States v. Caldes, 457 F.2d 74, 76-77, 79 (9th Cir. 1972).

In the present case, the Court of Appeals stated that Federal labor laws do not provide the exclusive remedy for dealing with union violence to achieve collective-bargaining purposes. United States v. Thordarson, et al., 646 F.2d 1323, 1331 (9th Cir. 1981) (Appendix A, p 17) This is correct; other remedies are available. Injunctive relief may be sought in State courts. See Beacon Moving and Storage, Inc. v. Local 814, Etc., 362 F. Supp. 442, 444-445 (S.D.N.Y.

1972).[2/] Compensation for damages may be obtained under State tort laws. United States v. Thordarson, et al., supra, 646 F.2d at 1331 n. 13. (Appendix A, p 51) Federal Court injunctive relief is available. Scott v. Moore, 640 F.2d 708, 714, 723-4, 731 (5th Cir. 1981). Finally, criminal acts may be prosecuted under State law. Thordarson, supra, 1331, 1338 (Judge Pregerson, dissenting) (Appendix A, pp 18, 19, 72); United States v. Enmons, supra, 410 U.S. at 410-412.

However, the conclusion of the Court of Appeals that the Federal criminal stat-

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2/ The RICO Act authorizes injunctive relief. These provisions are found in both the criminal penalties, 18 U.S.C. § 1963(b), and civil remedies, 18 U.S.C. § 1964(a)(b). Under the Government's theory, the injunctive relief available as a criminal penalty in § 1963(b) could logically be used to restrain acts done by union members in furtherance of legitimate labor objectives, which acts violated § 1962. See United States v. Turkette, ___ U.S. ___, 101 S.Ct. 2524, 2529-2530, ___ L.Ed ___ (1981) (discussion of civil remedies under RICO).

utes charged here may be applied to acts committed in furtherance of legitimate labor disputes lacks persuasive legislative or judicial support. The Majority Opinion was unable to point to anything in the legislative history of Federal labor laws to support its conclusion. Instead, the Court below stated:

> "Nothing in the language or legislative history of federal labor legislation suggests that federal criminal statutes --enacted to supplement state criminal sanctions--should not similarly be available to punish union members and officials who try to achieve collective bargaining goals by means of the kind of violence charged in the indictment before us." Id. (Appendix A, p 18)

This falls far short of the explicit statutory language and clear legislative history called for in Enmons, supra, 410 U.S. at 411.

Nor is the Court of Appeals able to

rely upon persuasive judicial precedent for its conclusion. In again attempting to turn a lack of authority into support for its conclusion, the Court cites three explosives cases in which the issues dealt with in Enmons and presented by the present case were neither raised nor discussed. Thordarson, supra, 646 F.2d at 1327 n. 8 (Appendix A, pp 40-41).[3/] This paucity of case support is indicative of the fact that the Government has rarely sought to use Federal criminal laws to police labor disputes.

It is without question that certain acts of violence and threats of violence committed by either unions or employers

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3/ United States v. Parker, 586 F.2d 422 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979); United States v. Love, 482 F.2d 213 (5th Cir.), cert. denied, 414 U.S. 1026 (1973); Langel v. United States, 451 F.2d 957 (8th Cir. 1971). Langel was actually decided before Enmons, supra.

can, in certain narrowly defined circumstances, be held to be unfair labor practices. 29 U.S.C. § 158. See NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 10-11 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977); NLRB v. Georgetown Dress Corporation, 537 F.2d 1239, 1242 (4th Cir. 1976). In the present case, it is sufficient to say that nothing done during the course of the Union's efforts to induce Redman into recognizing it was ever found or even alleged to constitute an unfair labor practice. To now claim that certain acts allegedly committed in furtherance of that legitimate labor dispute are Federal crimes is an insidious intrusion into a federally protected area. United States v. DeLaurentis, supra, 491 F.2d at 214.

C. BEFORE FEDERAL CRIMINAL STATUTES CAN BE APPLIED TO ACTS OCCURRING IN CONNECTION WITH A LEGITIMATE LABOR DISPUTE, A CLEAR EXPRESSION OF CONGRESSIONAL INTENT IS NECESSARY

1. No Specific Legislative Intent Exists Supporting the Application of the Statutes Charged in this Context.

The application of R.I.C.O., the Travel Act, the explosives statute and the embezzlement statute to acts allegedly committed in the context of a legitimate labor dispute is not supported by clear legislative intent. On the contrary, it is the clear intent of Congress that such acts, if criminal, shall be left to the States. United States v. Enmons, supra, 410 U.S. at 411; United States v. Quinn, supra, 514 F.2d at 1257.

As stated in Bell v. United States,

349 U.S. 81, 83 (1955):

> "When Congress has the will it has no difficulty in expressing it . . . . When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."

The Government attempts to distinguish Enmons by stating that, while extortion in a labor context was charged in Enmons, the present case involves the simple crime of arson. Such an attempt ignores the very language of the Indictment, as well as the principles enunciated in Enmons. As noted earlier, the Government alleges that, during the period of time covered by the Indictment, the Locals "sought to unionize Redman employees." (Appendix E [Indictment], p 135) The Government then goes on to charge:

> "It was part of the conspiracy that the defendants would and did utilize fear, threats and violence, including arson and threats of arson to induce Redman Moving and Storage Company by unlawful means into recog-

nizing the Teamsters Union." (Id. at p 137)

Thus, even if the Government's restrictive interpretation of Enmons is correct, it is clear that the Indictment has in fact charged the defendants with extortion in the context of a legitimate labor dispute.

The Government's reading of Enmons is too narrow. United States v. Thordarson, supra, 646 F.2d at 1338 (Judge Pregerson, dissenting) (Appendix A p 70). A similar attempt by the Government to avoid the dictates of Enmons was rebuffed in United States v. DeLaurentis, supra, 491 F.2d 208 (2nd Cir. 1974). In DeLaurentis, the Government attempted to utilize an 1870 Civil Rights statute to prosecute three officers of a labor union for conspiring to "injure, oppress, threaten and intimidate" members of the union in the free exercise of their right not to participate in certain

labor activity. The Second Circuit reversed the defendants' convictions and ordered the Indictment dismissed, ruling that the defendants' acts had not been made criminal by Congress. Id. at 211, 214.

The Court held that the comprehensive statutory scheme enacted by Congress as the National Labor Relations Act controlled the regulation of acts such as those at issue in DeLaurentis. Id. at 211. The Court noted that criminal penalties were not intended for violations of the Act; such penalties were "conspicuously absent" from the Act. Id. at 212-213; See United States v. Caldes, supra, 457 F.2d at 78.

As in this case, the violence charged in DeLaurentis occurred in the course of a legitimate labor dispute. As here, the defendants were not charged with seeking personal gain, but with conspiring to advance the aims of their union by illegal means.

As here and in Enmons, the statutory language arguably applied to the Acts alleged. 491 F.2d at 211-212; Enmons, supra, 410 U.S. at 399; See United States v. Turkette, supra, 101 S.Ct. at 2527.

Relying upon Enmons, the Second Circuit ordered the Indictment dismissed, because the language and history of the statute charged did not explicitly reflect the intent of Congress to make even violent criminal acts committed in furtherance of legitimate labor goals Federal offenses. Citing Enmons and United States v. Bailes, 120 F.Supp. 614, 637 (S.D.W.Va. 1954), the Second Circuit concluded:

> "The Government has unjustifiably used federal law to convert an unfair labor practice into a criminal

conspiracy." 491 F.2d at 214[4/]

The lengthy discussion of the legislative history of the R.I.C.O. Act in United States v. Turkette, supra, 101 S.Ct. at 2531-2534 and notes 11-14, makes it clear that the major purpose of Congress in enacting R.I.C.O. was to ". . . address the infiltration of legitimate business by organized crime." Id. at 2532. Congress sought to attack the source of organized

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4/ As the Ninth Circuit stated in Caldes, supra, 457 F.2d at 79:

> "[I]t appears to us that the acts of vandalism of the type committed by these appellants would be more properly and suitably prosecuted in the state courts and it is doubtful if Congress intended by Section 1951 to elevate this type of conduct to the level of the federal court."

See United States v. Quinn, supra, 514 F.2d at 1257; Cf. Scott v. Moore, supra; 640 F.2d at 723-724 ("Section 1985(3) cannot be invoked to disrupt the operation of a carefully integrated statutory scheme" and citing United States v. DeLaurentis, supra).

crime's economic power, whether that power was wielded through legitimate or illegitimate enterprises. Id at 2532-2534. See also United States v. Marubeni America Corp., 611 F.2d 763, 769 n. 11 (9th Cir. 1980).

It is also established that R.I.C.O. is not limited to members of "organized crime" or "labor racketeers" as those terms are commonly used. United States v. Thordarson, et al., supra, 646 F.2d at 1328-1329 n. 10. Nor is the reach of the Travel Act limited in this fashion. Id.[5/]

5/ However, Courts have repeatedly rejected an "expansive" application of the Travel Act which, among other things, "...might well produce situations in which...relatively minor state offenses [would be transformed] into federal felonies." Rewis v. United States, 401 U.S. 808, 812 (1971), as quoted in Erlenbaugh v. United States, 409 U.S. 239, 247 n. 1 (1972); United States v. Polizzi, 500 F.2d 856, 874 (9th Cir. 1974), cert. denied 419 U.S. 670 (1975) ["...prosecutions of minor illegal acts incidental to an otherwise legal business."]

Nevertheless, before these statutes may be applied to acts done in furtherance of legitimate collective-bargaining objectives, a clear expression of Congressional intent must be found. The explicit language of the statutes fails to disclose such an intent. The legislative history of the statutes fails to disclose such an intent. In the absence of such an expression of Congressional intent, it cannot be concluded that Congress:

> ". . . intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States."
> Enmons, supra, 410 U.S. at 411

Congress is now considering legislation which would, in effect, limit the scope of the Enmons' decision. This action is an indication of the fact that Congress did not intend present Federal criminal laws to cover acts committed to further

legitimate labor disputes. The legislation as originally proposed in the Senate was designed to amend the extortion laws and contained a highly significant exclusion. Sub-paragraph (b) of proposed Section 1722 of S.1722 (96th Congress, First Session) stated:

> "(b) BAR TO PROSECUTION.--It is a bar to prosecution under this section that the offense occurred in connection with a labor dispute as defined in 29 U.S.C. 152(9) to achieve legitimate collective bargaining objectives, unless there is clear proof that the conduct which constitutes the threat or placing in fear required under subsection (a)(1) consists of a felony and the conduct was engaged in for the purpose of causing death or severe bodily injury in order to secure such objectives; and the Attorney General, Deputy Attorney General, or Assistant Attorney General for the Criminal Division certifies in writing that--
>
> "(A) the facts establish the existence of the additional elements of the offense required under this subsection;
>
> "(B) a federal prosecution should be commenced under this section; and
>
> "(C) the State is unable or unwilling to proceed with any equivalent prosecution relating to such conduct.
>
> (pp 119-120 of Report No. 96-553)

S. 1722 thus recognized the deference accorded to State criminal proceedings in this sensitive area of federally protected rights.

On March 3, 1981, a Bill which, if passed, would effectively overrule Enmons was introduced in the first session of the Ninety-Seventh Congress. S. 613 is presently being considered by the Senate Judiciary Committee. In addition to extortion provisions, S. 613 also prohibits certain acts affecting interstate commerce without regard to "extortion" or "wrongful taking." See ¶(a) sub-paragraphs (1) and (2), which relate to acts involving threats of death and property damage of a certain dollar amount. Subsection (c)(2) then states:

> "Nothing in this section shall be construed as indicating an intent on the part of the Congress--
>
> . . . . .

> "(2) to exclude federal jurisdiction over the offenses defined in this section on the ground that the conduct is also a violation of state or local law, or that the conduct, if it involves force, violence, or fear thereof, takes place in the course of a legitimate business or labor dispute or in pursuit of a legitimate business or labor objective."

S. 613 is thus a clear indication of a belief on the part of Congress (and perhaps the Justice Department) that acts such as are charged in this case are not covered by existing Federal criminal laws.

As was stated in the dissenting Opinion in the Court below:

> "More serious, however, is the majority's failure to appreciate that the Enmons decision rests not solely on the interpretation of the particular statute involved there, but on a broad historically justified concern that the federal government not intrude into the business of policing the orderly conduct of legitimate labor disputes. Punishing lawlessness perpetrated during labor disputes has historically been and should continue to be the province of

> the States and their law enforcement authorities."
> Thordarson, supra, 646 F.2d at 1338 (Judge Pregerson, dissenting) (Appendix A, pp 71-72)

The majority opinion in the Court below itself recognizes that Enmons cannot be read as based solely on the language and legislative history of the Hobbs Act. After noting that the Travel Act includes

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extortion within its definition of "unlawful activity", and that R.I.C.O. includes extortion chargeable under State law within its definition of "racketeering activity", the majority states:

> "In light of the emphasis in Enmons on the special characteristics of the crime of extortion. . . its holding delimiting the scope of the Hobbs Act arguably should be extended to similarly limit the scope of the RICO and Travel Act extortion provisions. That issue, however, is not before us at this time." Thordarson, supra, 646 F.2d at 1327-1328 n. 9 (Appendix A, pp 41-42)

Thus, the application of R.I.C.O. and the Travel Act to labor disputes creates the same risk as the application of the Hobbs Act to such disputes. Id at 1338 and n. 1 (Judge Pregerson, dissenting). (Appendix A, pp 71, 72-73) Acts done in furtherance of legitimate labor goals which are extortionate in nature as well as acts of vandalism incidental to legitimate labor disputes will be transformed into

Federal felonies. Neither the language nor the legislative history of the statutes in question contemplates such a result.

2. Reference to Related Statutory Schemes Reinforces the Conclusion that Congress Did Not Intend These Statutes To Be Used in the Context of Legitimate Labor Disputes and That the Prosecution of Such Acts Has Been Left to the States.

In a Travel Act case decided before Enmons, the Court recognized the rule of statutory construction that reference to related statutory schemes is proper in resolving doubts as to the meaning of a statute. Erlenbaugh v. United States, supra, 409 U.S. at 243-245. The statutes charged in the present case and the Hobbs Act pertain to the same subject and should therefore be construed "as if they were one law"

in resolving the issues presented in this case. Id. at 243. As further noted in Erlenbaugh, the principle necessarily assumes that:

> "[W]henever Congress passes a new statute, it acts aware of all previous statutes on the same subject. [citations omitted]." 409 U.S. at 244.

The Hobbs Act, passed in 1948, and the Travel Act, passed in 1961, are both found in Chapter 95 of Title 18, "Racketeering." Even the Government states that they are part of the same "legislative package." (Appellant's Opening Brief, Ninth Circuit, p 17, n. 22) The R.I.C.O. statute, passed in 1970, is found in Chapter 96 of Title 18, "Racketeer Influenced and Corrupt Organizations." These related statutes all pertain to the same subject matter. Moreover, 18 U.S.C. §844(i), Damage by Explosives to Vehicles Used in Interstate Commerce, was enacted along with the

R.I.C.O. statute as part of the Organized Crime Control Act of 1970, Public Law 91-452. All the statutes are part of an overall congressional attempt to combat racketeering activity and organized crime. United States v. Turkette, supra, 101 S. Ct. at 2531-2534; United States v. Thordarson, supra, 646 F.2d at 1328.

The legislative and judicial history of the Hobbs Act, as discussed in Enmons, supra, 410 U.S. at 401-408, and United States v. Caldes, supra, 457 F.2d at 76-77, further demonstrates that Congress did not intend these statutes to be applied to acts committed in connection with legitimate labor disputes.

In the Caldes case, which was decided before and cited with approval in Enmons, the Ninth Circuit concluded that the Hobbs Act:

> ". . . was not intended to reach low level violence committed in connection with bona fide labor disputes between employers and employees." Id. at 75.

As in the present case, the defendants in Caldes were union officials attempting to secure a collective bargaining agreement. During protracted negotiations with a linen supply company, the defendants purportedly damaged property belonging to the company. As here, the violence was intended to pressure the company into an agreement. Id.

The Ninth Circuit examined the history of the Hobbs Act, noting that it was enacted in reaction to the decision in United States v. Local 807, 315 U.S. 521 (1942). In Local 807, the Supreme Court held that Section 2(a) of the Anti-Racketeering Act of 1934 (the "Copeland Act") did not prohibit the demanding of payment for unwanted, unnecessary or fic-

titious services by union members. Id. at 75-76.

In a reaction to that decision, Congress passed the Hobbs Act, which eliminated Section 2(a) of the Copeland Act. By so doing, however:

> "Congress did not intend to eliminate traditional labor or union activity, albeit militant, which has as its object legitimate ends. The exclusion was not meant to provide impunity to the terroristic and extortionate activities of union members, but to protect union activity directed towards legitimate labor goals even when militantly pursued." Id. at 76. [emphasis added]

The Ninth Circuit noted that labor activity may be proscribed under the Hobbs Act, if it involves circumstances where the services offered by the union are imposed, unwanted and superfluous or fictitious. Id. at 77. On the other hand, the Court stated that:

> "Labor unions must be able to actively and rigorously pursue the interest of their members at all times, pro-

vided their activity is directed toward legitimate ends." Id. at 78.

In Enmons, supra, this Court affirmed the District Court's dismissal of the Indictment for failure to state a Federal offense, holding that the Act did not apply to the use of force to achieve legitimate labor ends. 410 U.S. at 401. The Court noted that no reported case had upheld the theory that the Hobbs Act proscribed the use of force to achieve legitimate collective-bargaining demands. Id. at 408. As the Court stated:

> "Indeed not until the indictments were returned in 1970 in this and several other cases has the Government even sought to prosecute under the Hobbs Act actual or threatened violence employed to secure a union contract 'calling for higher wages and other monetary benefits.' [footnote omitted] Yet, throughout this period, the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence. It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in

> enacting the Hobbs Act, its action would have so long passed unobserved." Id. at 409-410.

Those comments apply with equal force to the statutes employed in the present case. By attempting to circumvent the dictates of Enmons, the Government seeks to bring to Federal Court the numerous instances of strike-related violence which are a part of many labor disputes. It was not the intent of Congress to have such matters litigated in a criminal context in Federal Court. This attempt to expand Federal criminal jurisdiction should be rejected.

CONCLUSION

Based upon the foregoing reasons, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

APPENDIX A

FILED
May 20, 1981
RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)
Plaintiff-Appellant,	)
v.	)
STEN THORDARSON,	)
MARTIN FRY,	)
CRAIG DUNBAR,	)
MARTIN SALGADO, and	)
CHARLES WISE,	)
Defendants-Appellees.	)
	)

No. 80-1239

D.C. CR 79-946-RMT

O P I N I O N

Appeal from the United States District Court for the Central District of California
Robert M. Takasugi, United States District Judge, Presiding

Argued and Submitted September 17, 1980

Before: FERGUSON, PREGERSON, and NORRIS, Circuit Judges

NORRIS, Circuit Judge:

The government appeals from a district court order dismissing a ten-count indictment charging defendants with violating 18 U.S.C. §§ 1962(d), 1952, and 844(i), and 29 U.S.C. § 501(c). This court has jurisdiction under 18 U.S.C. § 3731. We reverse.

I. Facts

In 1978, the employees of the Redman Moving and Storage Company of Thousand Oaks, California, elected Teamsters Local 186 as their bargaining agent. When Redman refused to recognize the union, Local 186, aided by Teamsters Local 389, called a strike against the company. During the time of the strike, Redman trucks in California, Arizona and Connecticut were damaged or destroyed.

In November of 1979, a ten-count indictment was filed in the United States

District Court for the Central District of California, alleging that the defendants--all officers or employees of Local 186 or Local 389--conspired to destroy Redman trucks in an effort to coerce Redman into recognizing the Teamsters.

The indictment charges defendants with the use of explosives to damage vehicles used in interstate commerce in violation of 18 U.S.C. § 844(i)[1] (Counts 2 and 3); travel in interstate commerce to commit arson in violation of the Travel Act, 18 U.S.C. § 1952[2] (Counts 4 and 5); conversion of union funds in violation of 29 U.S.C. § 501(c)[3] (Counts 6 through 10); and conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1962(d)[4] (Count 1).[5] The al-

leged pattern of racketeering included the conduct charged substantively in Counts 2 through 10.

The district court dismissed all ten counts of the indictment. The RICO, Travel Act and explosives charges (Counts 1-5) were dismissed on the authority of United States v. Enmons, 410 U.S. 396 (1973), which the district court read as "preclud-[ing] federal prosecution for violent activity which occurs during the course of a legitimate labor dispute" absent specific authorization from Congress. United States v. Thordarson, 487 F.Supp. 991, 995 (C.D. Cal. 1980). The conversion of union funds charges were dismissed for failure to allege essential elements of the offense.

II. Counts 1 through 5: United States v. Enmons

In Enmons, the defendants were striking union members charged with using vio-

lence to obtain higher wages and other employment benefits in violation of the Hobbs Act, 18 U.S.C. § 1951. The issue was whether acts of violence committed during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective bargaining demands constituted extortion, defined by the Hobbs Act as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear." 18 U.S.C. § 1951(b)(2).[6]

In interpreting the statute, Justice Stewart, writing for the majority, focused on the word "wrongful," and reasoned that because it would be redundant to speak of "wrongful violence" or "wrongful force," Congress must have intended "wrongful" to limit the statute's coverage "to those instances where the obtaining of the proper-

ty would itself be 'wrongful' because the extortionist has no lawful claim to the property." 410 U.S. at 400. Accordingly, the Court held that violence to achieve legitimate union objectives is not within the Hobbs Act's prohibition because there is no "wrongful" taking of the employer's property when union members receive wages and benefits in exchange for genuine services bargained for by the employer.

The Court found support in the legislative history of the Hobbs Act for its interpretation of "extortion". The predecessor of the Act, § 2 of the Anti-Racketeering Act of 1934, 48 Stat. 979, proscribed the exaction of valuable consideration by force, violence or coercion, but expressly excepted "the payment of wages by a bona-fide employer to a bona-fide employee." In enacting the Hobbs Act, Congress eliminated this express

wage exception in response to the Supreme Court's decision in United States v. Local 807, 315 U.S. 521 (1942). In that case, the Court had held that the wage exception immunized from prosecution under the Anti-Racketeering Act New York City truck drivers who "by violence and threats exacted payments for themselves from out-of-town truckers in return for the unwanted and superfluous service of driving out-of-town trucks to and from the city." Enmons, 410 U.S. at 402. The Enmons Court, however, despite Congress' repeal of the express wage exception in enacting the Hobbs Act, read the legislative history as evidencing an intent to preserve an exemption for violence in pursuit of legitimate collective bargaining objectives. Id at 404-07. In particular, the Court pointed to assurances given during the floor debate that the Hobbs Act would not interfere with

legitimate labor activity and that a simple assault during a strike would not become a federal crime under the Act. Id.[7]

The Court noted that the broad interpretation of extortion advanced by the government would reach "all overtly coercive conduct in the course of an economic strike . . . [with the result that][t]he worker who threw a punch on a picket line or the striker who deflated the tires on his employer's truck would be subject to a Hobbs Act prosecution and the possibility of twenty years' imprisonment and a $10,000 fine." Id. at 410. In rejecting this reading of the statute, the Court concluded:

> [I]t would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes. Neither the language of the Hobbs Act nor its legislative history can justify

> the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the United States.

Id. at 411.

The defendants contend that the effect of Enmons is to place violence during the course of legitimate strike activity beyond the reach of all federal criminal laws. We cannot agree. There is no basis in the Court's decision or its underlying rationale for the creation of an "Enmons doctrine" of immunity applicable to all federal criminal statutes.[8] We read Enmons as holding only that the use of violence to secure legitimate collective bargaining objectives is beyond the reach of the Hobbs Act.

The Court's holding in Enmons turned on its reading of the specific language of § 1951--particularly the term "wrongful"

in the definition of extortion--and its reading of the Hobbs Act's singular legislative history. By contrast, the defendants have not cited, and we have not found, anything in the statutory language or the legislative history of the Travel Act, RICO or § 844 of Title 18 which indicates that Congress intended to exclude from the reach of those statutes violence in the pursuit of legitimate union objectives. Indeed, our reading of those statutes suggests that Congress intended no such exemption.[9]

The Travel Act, on its face, applies to "[w]hoever travels in interstate . . . commerce or uses any facility in interstate commerce . . . with intent to . . . promote, manage, establish, carry on . . . arson in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952. Section 844(i) of Title

18 covers "[w]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of explosive, any . . . vehicle . . . used in interstate commerce . . . or in any activity affecting interstate . . . commerce." RICO provides that it shall be unlawful to conspire "to conduct or participate . . . in the conduct [of an] enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c),(d). Racketeering activity includes "any act or threat involving . . . arson . . . which is chargeable under state law and punishable by imprisonment for more than one year; . . . any act which is indictable under title 18, United States Code . . . Section 1952 . . . [and] any act which is indictable under title 29, United States Code, . . . section 501(c)." 18 U.S.C. § 1961(1).

These statutes are written in general

terms and make criminal the prescribed conduct without regard to the status or ultimate objectives of the person engaging in it.[10] See, e.g., United States v. Roselli, 432 F.2d 879, 885 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971)(Travel Act); United States v. Perrin, 580 F.2d 730, 733 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979) (Travel Act); United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976)(RICO); United States v. Field, 432 F.Supp. 55, 57-58 (S.D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978)(RICO). We consider it improbable that Congress, having determined that arson and the willful misuse of explosives constituted a sufficiently grave threat to persons and property to warrant the imposition of federal criminal sanctions, intended to make the imposition of such sanctions depend upon whether the

person who willfully causes the fire or explosion did so for his own personal gain or for the gain of members of his union.

Nor do we consider the policy arguments advanced in Enmons applicable to this case. In Enmons, the Court focused on the special characteristics of the crime of extortion which embraces any act or threat of violence, however minor, used to obtain the property of another. The underlying concern was that to apply a federal extortion statute in the context of the collective bargaining process would transform minor acts of labor violence punishable by state law into federal felonies, thus placing the federal government in the business of policing the routine conduct of strike activity.

There is little, if any, risk that the crimes charged in this indictment, if applied to labor violence, would involve the federal government in policing routine

strike activity. The destruction of vehicles used in interstate commerce by means of explosives and travel in interstate commerce to commit arson are hardly the sorts of minor picket line violence that the Enmons Court feared would be transformed into federal crimes under the Hobbs Act.

Moreover, there is no basis for the contention that the indictment in this case constitutes an unintended incursion into state criminal jurisdiction. Both RICO and the Travel Act explicitly prohibit conduct also chargeable under state laws of arson. 18 U.S.C. § 1961(1); 18 U.S.C. §1952(b)(2). In addition, the legislative history of 18 U.S.C. § 844 clearly shows that it was enacted in response to the perceived "absence of any effective state or local controls" over explosives. H.R. Rep. No. 91-1549, 91st Cong. 2d Sess., reprinted in [1970]

U.S. Code Cong. & Ad. News at 4007, 4013. See also United States v. Dawson, 467 F.2d 668, 671-73 (8th Cir. 1971), cert. denied, 410 U.S. 956 (1972). Thus, to the extent that this indictment, by reaching conduct also punishable under state law, represents an incursion into state criminal jurisdiction, it was an incursion plainly and deliberately undertaken by Congress.[11]

To uphold the dismissal of Counts 1 through 5, we would be required to create an exemption for labor violence that would necessarily be applicable to all federal criminal statutes. As counsel for the defendants candidly admitted during oral argument, if an "Enmons doctrine" were to immunize a union official from federal prosecution under the Travel Act or § 844(i), it would, in all logic, immunize from federal prosecution a union official--or, indeed, an employer--desperate enough to

resort to kidnapping to achieve collective bargaining objectives. To carve out a narrow exemption from a federal extortion statute on the basis of its language and legislative history, as the Supreme Court did in Enmons, is one thing; to exempt a wide range of violent behavior from all federal criminal liability, despite plain language that prohibits such conduct, is quite another.[12]

The defendants nevertheless contend that the federal regulation of labor union activities through a comprehensive scheme of predominantly civil remedies evidences a Congressional intent to exempt labor violence from federal criminal prosecution. This argument is without merit. The federal labor laws do not purport to govern all unlawful conduct engaged in by union members and officials. Thus, while acts of violence directed at an employer

during a strike may be found, in some circumstances, to restrain or coerce employees in the exercise of their rights guaranteed under § 7 of the National Labor Relations Act, see e.g., NLRB v. Union Nacional de Trabajadores, 540 F.2d 1 (1st Cir. 1976), cert. denied, 429 U.S. 1039 (1977); NLRB v. United Mine Workers, 429 F.2d 141, 147-48 (3rd Cir. 1970), they are not in and of themselves unfair labor practices. Cf. Linn v. Plant Guard Workers, 383 U.S. 53, 63 (1966) (defamation arising during a labor dispute is not an unfair labor practice absent showing that it interfered with exercise of specific rights guaranteed under the National Labor Relations Act). Moreover, even to the extent that federal labor laws do reach union violence to achieve collective bargaining objectives, it is clear that they do not provide the exclusive remedy for such violence.

See Linn v. Plant Guard Workers, supra; Auto Workers v. Wisconsin Board, 351 U.S. 266, 272-73 (1956). Defendants concede, for example, that arson and the destruction of property by means of explosives may be prosecuted under state criminal laws whether or not those acts also constitute unfair labor practices.[13] Nothing in the language or legislative history of federal labor legislation suggests that federal criminal statutes--enacted to supplement state criminal sanctions--should not similarly be available to punish union members and officials who try to achieve collective bargaining goals by means of the kind of violence charged in the indictment before us.

The defendants' reliance on United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974), is also misplaced. In DeLaurentis, the federal government invoked

an 1870 civil rights statute to prosecute union officials for threatening and intimidating union members in violation of § 7 of the National Labor Relations Act, which gives an employee the right to refrain from engaging in concerted union activities. In reversing the conviction, the Second Circuit held that Congress did not intend § 7 violations to be enforced under the 1870 Civil Rights Act, 18 U.S.C. § 241,[14] but rather intended such violations to be enforced by the procedures and sanctions provided by the National Labor Relations Act. In this case, the undisputed availability of state criminal law demonstrates that the procedures and civil sanctions set forth in the National Labor Relations Act were not intended to be the exclusive means of regulating violence to achieve collective bargaining objectives. Moreover, in contrast to the broad language

of the 1870 Civil Rights Act prohibiting persons from conspiring to "injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by him by the . . . laws of the United States," the language of the statutes involved in this appeal plainly and specifically reaches the acts of violence alleged in the indictment.

We therefore reverse the dismissal of Counts 1 through 5 of the indictment.

III. Counts 6 through 10: the § 501(c) Violations

The government also appeals from the district court's dismissal of Counts 6 through 10 of the indictment which charge the defendant with using union funds to destroy Redman trucks in violation of § 501(c) of the Landrum-Griffith Act, 29 U.S.C. § 501(c). Section 501(c) prohibits

a union officer or employee from converting union funds to his own use or the use of another.[15]

The district court dismissed Counts 6 through 10 apparently for failure to allege essential elements of the offense. See United States v. Thordarson, 487 F.Supp. 991, 995-99 (C.D. Cal. 1980). The district court held that the essential elements of § 501(c) include (1) a fraudulent intent to deprive the union of its funds and (2) either a lack of union authorization or an absence of a good faith belief in benefit to the union. Id. at 996-97. Not finding these elements alleged in the indictment,[16] the district court dismissed. Id. at 998-99.

The government contends that the use of union funds for an illegal purpose constitutes a per se violation of § 501(c) under United States v. Boyle , 482 F.2d

755 (D.C. Cir.), cert. denied, 414 U.S. 1076 (1973). This court, like the court below, declines to follow Boyle and the per se rule it espouses. We nevertheless conclude that the district court erred in dismissing the indictment for failure to allege the essential elements of a § 501(c) offense. We hold that neither a lack of union authorization nor an absence of good faith belief in union benefit need be alleged in an indictment as essential elements of § 501(c), and that the indictment in this case adequately alleged fraudulent intent. We reverse, therefore, the district court's dismissal of Counts 6 through 10.

A. United States v. Boyle

The defendant in Boyle was convicted of violating § 501(c) by using union funds to make campaign contributions. The contributions were illegal under 18 U.S.C. § 610 (repealed Pub. L. No. 94-283, Title

II, § 201(a), 90 Stat. 496 (1976)) which prohibited labor unions from contributing money to candidates for federal office. On appeal, the defendant challenged his conviction on two grounds. First, he contended that to convict under § 501(c) the jury must find either that the expenditure was made without union authorization or that the union derived no benefit from the expenditure. Second, he argued that § 501 (c) was intended to punish only knowingly illegal or ultra vires expenditures. The Court of Appeals for the District of Columbia rejected both contentions.

The D.C. Circuit noted that "[n]o officer or union governing body could in all logic believe that a transfer for a criminal purpose was for a legitimate union purpose, was authorized by the union constitution or by-laws, or was for the union's benefit." United States v. Boyle,

482 F.2d at 765. Nor was there any "hint in either the statute or its legislative history that indicates a Congressional intent to excuse from the ambit of § 501(c) transfers for a criminal purpose." Id. The Court thus concluded "[i]f the use to which the money is knowingly transferred is unlawful, then the transfer constitutes a violation of § 501(c)." Id. at 764.

In this case, the union funds were allegedly used for the purpose of financing the destruction of Redman trucks. The government argues that since the expenditure was for an unlawful purpose the indictment is sufficient to state a § 501 (c) offense under the Boyle decision. We, however, like the district court, find Boyle unpersuasive.[17]

Section 501(c) states a "larceny-type" offense. United States v. Marolda, 615 F.2d 867, 872-73 (9th Cir. 1980)(Judge

Larson, concurring); United States v. Silverman, 430 F.2d 106, 126-27 (2d Cir.), modified on other grounds, 439 F.2d 1198 (1970), cert. denied, 402 U.S. 953 (1971). Although the scope of criminal liability under § 501(c) extends beyond the common law offense of larceny and the old statutory crime of embezzlement, the essence of the § 501(c) crime, like the older crimes of embezzlement and larceny is the "tak[ing] [of] another's property . . . knowing that the other person would not have wanted that to be done." United States v. Silverman, 430 F.2d at 126-127; United States v. Andreen, 628 F.2d at 1241. Thus, it is well established that proof of a specific criminal intent to deprive the union of its funds is required to make out a § 501(c) violation.

The Boyle court, however, would in effect irrebuttably presume the requisite

criminal intent where union funds are used for a criminal purpose. The effect of such an approach would be to impermissibly convert a "larceny-type" statute requiring a fraudulent intent to deprive the union of its funds into a statute subjecting individual officers and employees to criminal liability for union expenditures made for prohibited purposes.[18] In addition, such an interpretation would permit a conviction under § 501(c) without a finding by the trier of fact that the defendant has "taken another person's property . . . knowing that the other person would not have wanted that to be done." United States v. Silverman, 430 F.2d at 126-127. We conclude that such an approach improperly presumes an essential element of a § 501(c) offense. Accordingly, we decline to follow Boyle.

B. The Essential Elements of § 501(c)

Since it is not disputed that fraudu-

lent intent is an element of §501(c), we must consider whether lack of authorization and lack of good faith belief in union benefit are also elements of § 501(c). In two recent cases this circuit addressed this issue without totally resolving it. United States v. Andreen, 628 F.2d 1236 (9th Cir. 1980); United States v. Marolda, 615 F.2d 867, 869-70 (9th Cir. 1980).

In Marolda, the defendant was convicted of violating § 501(c) after the court's instructions to the jury failed to mention lack of authorization or lack of union benefit. The court reversed the conviction because of a prejudicial variance between the jury instructions and the language of the indictment, which had explicitly alleged both lack of authorization and lack of union benefit. Id. at 870. Thus the court was not required to reach the issue whether either or both are essential elements of

§ 501(c). Judge Larson, however, in a well-reasoned concurring opinion, addressed the issue and concluded that neither lack of authorization nor lack of union benefit is an essential element. Id. at 872. Rather, he wrote, both bear on the issue of criminal intent.

In Andreen, the court held that if the government established lack of authorization, it need not prove lack of union benefit.[19] 628 F.2d at 1242-43. The court expressly left open the issue now before us --whether the government must allege and prove lack of union benefit if it fails to establish lack of authorization--although in dictum it approved the position taken by Judge Larson in his concurring opinion in Marolda. Andreen, 628 F.2d at 1242. We also agree with Judge Larson and now hold that neither lack of authorization nor lack of good faith belief in union benefit is an

essential element of § 501(c). Neither, therefore, need be alleged in the indictment, even though we recognize that evidence of either or both is likely to be admissible at trial as bearing on the issue of criminal intent to convert union funds to the defendant's own use or the use of another.

Section 501(c) is one of a number of statutes in which Congress has extended federal jurisdiction to cover common law theft crimes. As noted by Judge Friendly in United States v. Silverman, 430 F.2d at 126, the language of § 501(c) resembles the language of such "larceny-type" statutes as 18 U.S.C. §§ 641, 645, 655-61.[20] In determining the elements of § 501(c), we are strongly influenced by the doctrine of these other "larceny-type" statutes.

Judge Larson, in his concurrence in Marolda, suggests that Congress, in enacting § 501(c), "was merely transmuting common

law theft crimes involving union funds and committed by union officers or employees into Federal crimes." 615 F.2d at 872. The Supreme Court has stated in dictum that 18 U.S.C. § 641 was intended to combine the common law theft crimes and also outlaw acts which might fall into the "gaps or crevices" separating those crimes. Morissette v. United States, 342 U.S. 246, 271 (1952). As we read the legislative history of § 501(c), Congress' intent in passing it was the same as with § 641.[21] We see no evidence that Congress, in enacting § 501(c), intended to add any new elements to the common law theft offenses except those necessary to show federal jurisdiction and subject matter: that the accused is (1) an official or employee (2) of a labor organization (3) involved in interstate commerce, and that (4) the funds belong to the labor organization.

United States v. Bane, 583 F.2d 832, 836 n.9 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979)(identifying the jurisdictional elements of § 501(c)); Silverman, 430 F.2d at 111 (same). Instead, as stated in Morissette, supra, Congress intended to simplify some of the technical requirements of the common law crimes.

We therefore see no reason to add lack of authorization or lack of good faith belief in union benefit to the list of essential elements of § 501(c). Neither of the two has a counterpart in the elements of the common law theft crimes or of the other federal theft statutes.[22] "Congress subjected union officers or employees to the same test of criminal liability as government employees, bank officers and the like--not to a lower one." Silverman, 430 F.2d at 127. The two elements which the government must allege and prove, in

addition to jurisdictional elements, in making out a § 501(c) violation, are the same as those announced by the Supreme Court for § 641: fraudulent intent and conversion to the defendant's own use or the use of another. Morissette, 342 U.S. at 271-72.[23] See also United States v. Durnin, 632 F.2d 1297, 1300 (5th Cir. 1980).[24]

We do think that lack of authorization, lack of union benefit, and the defendant's failure to believe that there is authorization or union benefit, all are likely to bear on the essential element of fraudulent intent. See Andreen, 628 F.2d at 1242-43; Marolda, 615 F.2d at 873 (Larson, J., concurring). In a particular case, these factors may be crucial in determining the defendant's intent. In such a case, a jury instruction concerning them is likely to be appropriate.

For example, in this case, appellants

are free to argue that they had no criminal intent because they believed that blowing up trucks conferred a benefit on the union and that the union, were it able to speak, would have wanted its money spent for such an unlawful purpose. The government can argue the contrary and in so doing is free to introduce evidence that destroying the trucks was unauthorized and did not work to the benefit of the union members as a whole. The trier of fact will then have to determine whether the government has proved its case that the defendants have "'taken another person's property . . . knowing that the other person would not have wanted that to be done,'" Andreen, 628 F.2d at 1241, quoting Silverman, 430 F.2d at 126-27, and that "the 'union' presumably would have objected if it had been able to speak freely." Silverman, 430 F.2d at 127.

In conclusion, we hold that the indict-

ment need merely allege fraudulent intent, and need not allege lack of authorization nor lack of belief in union benefit.

C. The Sufficiency of the Indictment

The district court in this case apparently held that the indictment was insufficient not only because it failed to set forth either lack of authorization or lack of good faith belief in union benefit, but also because it failed to adequately allege fraudulent intent. Upon review of the indictment, however, we find that fraudulent intent is adequately alleged.

Counts 6, 9, and 10 of the indictment allege that the defendants "did embezzle, steal, and unlawfully and wilfully abstract and convert to their own use and the use of another" the funds of the union. Counts 7 and 8 of the indictment allege that the defendants "did embezzle, steal and unlawfully convert to their own use

and the use of another" the funds of the union. Language just like that in Counts 6, 9 and 10 has been held to constitute a sufficient allegation of criminal intent under § 501(c). See Colella v. United States, 360 F.2d 792, 798-99 (1st Cir.), cert. denied, 385 U.S. 829 (1966); Doyle v. United States, 318 F.2d 419, 420-22 (8th Cir. 1963). The word "wilfully," read in the context of the statutory language used in the indictment as a whole, is sufficient to allege the requisite criminal intent. See United States v. Illinois Central Railroad Co., 303 U.S. 239, 242 (1938)("In statutes denouncing offenses involving turpitude, 'wilfully' is generally used to mean with evil purpose, criminal intent or the like").[25] The language in Counts 7 and 8, though less complete, adequately informs the defendants of the charges against which they must defend. See

Hamling v. United States, 418 U.S. 87, 117 (1974).

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

FOOTNOTES

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1. 18 U.S.C. § 844(i) provides that:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . . or fined . . . or both.

2. 18 U.S.C. § 1952 provides in pertinent part that:

> (a) Whoever travels in interstate or foreign commerce, or uses any facility in interstate or foreign commerce, including the mail, with intent to . . . (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage establish, carry on, or facilitate the promotion, management,

establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined . . . or imprisoned . . . or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

3. Section 501(c) provides that:

(c) Any person who embezzles or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined . . . or imprisoned . . . or both.

4. Section 1961(d) provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Section 1962(c) provides:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities

> of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

An "enterprise" as defined by § 1961(4) includes:

> any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

A "pattern of racketeering activity" as defined by § 1961(5):

> requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

"Racketeering activity" as defined by § 1961(1) includes:

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indict-

able under any of the following provisions of title 18, United States Code: . . . Section 1952 (relating to racketeering) . . . and (C) any act which is indictable under title 29, United States Code, . . . section 501(c) (relating to embezzlement from union funds).

5. All defendants are charged with violating the Travel Act, RICO and 28 U.S.C. § 501(c). Only defendants Fry and Salgado are named in the explosives counts.

6. 18 U.S.C. § 1951 provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined . . . or imprisoned . . . or both.
>
> (b) As used in this section--
>
> ....
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

7. Justice Douglas, writing for the four dissenters in Enmons, contended that by repealing the wage exception in the Anti-Racketeering Act and by rejecting similar amendments, Congress intended to include within the ambit of the Hobbs Act the use of threats and violence to achieve legitimate, as well as illegitimate, labor objectives. 410 U.S. at 413-19.

8. We are unaware of any other case in which a criminal defendant has attempted to assert United States v. Enmons as a defense to a prosecution under a statute other than the Hobbs Act. Cf. United States v. Parker, 586 F.2d 422 (5th Cir. 1978), cert. denied, 441 U.S. 962 (1979) (affirming without discussion of Enmons a conviction under § 844(i) on facts virtually identical to the case sub judice); United States v. Love, 482 F. 2d 213 (5th Cir.), cert. denied, 414

U.S. 1026 (1973) (same); Langel v. United States, 451 F.2d 957 (8th Cir. 1971) (affirming without discussion of Enmons a conviction of union members for possessing a prohibited firearm--a bomb --in violation of 26 U.S.C. § 5861(d) in connection with the destruction of an employer's truck during a bona fide labor dispute).

9. The Travel Act includes within its definition of unlawful activity "extortion . . . in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952(b)(2). Extortion chargeable under state law is also included in the definition of "racketeering activity" provided by RICO. In light of the emphasis in Enmons on the special characteristics of the crime of extortion, see discussion infra, its holding delimiting the scope of the Hobbs Act arguably

should be extended to similarly limit the scope of the RICO and Travel Act extortion provisions. That issue, however, is not before us at this time.

10. Thus, while the Travel Act was primarily directed at suppressing the unlawful local activities that provide organized crime with its source of funds, see Legislation Relating to Organized Crime: Hearings on H.R. 468, H.R. 1246, etc., before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. (1961); The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S.1653, S.1654, etc., before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961), its reach is not limited to the activities of organized crime. See, e.g., United States v. Rosselli, 432 F.2d 879, 884-85 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).

Rather, the Act forbids persons from traveling interstate or using the facilities of interstate commerce to commit any of the offenses enumerated in § 1952(b). See United States v. Nardello, 393 U.S. 286, 293 (1969). As this court observed in United States v. Roselli, supra, in rejecting the defendants' argument that their scheme to cheat at gin rummy was not within the reach of § 1952(b)(1),

> The words of Section 1952 are general; they contain no restriction to particular persons or to particular kinds of gambling, liquor, narcotics and prostitution offenses . . . . [A]s we read the legislative record, Congress meant exactly what the language of Section 1952 states--it deliberately chose to make the statute applicable generally, and without crippling restrictions, to any person engaged in any kind of illicit business enterprise in one of the four fields of activity specified in the statute, which experience showed to be those in which organized racketeers commonly engaged.

Id. at 885.

See also United States v. Barnes, 383 F.2d

287, 289 n.2 (6th Cir. 1967), cert. denied, 389 U.S. 1040 (1968); United States v. Vespe, 389 F.Supp. 1359, 1368-69 (D.Del.), aff'd sub nom. United States v. Shaffer, 520 F.2d 1369 (3d Cir. 1975).

The district court's conclusion that RICO does not apply because the "defendants have not engaged in any activities which constitute 'labor racketeering'" must be rejected for similar reasons. Although never clearly articulated, the defendants' theory appears to be that since the primary purpose of RICO is to rid legitimate organizations of the influence of organized crime, and since the defendants' conduct was not alleged to be in aid of organized crime nor part of a "racketeering scheme" as that term is most commonly used, RICO does not reach the defendants' conduct.

This circuit has squarely held, however, that RICO does not require that the

defendants be engaged in "organized crime." United States v. Campanale, 518 F.2d 352, 363 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). See also United States v. Grande, 620 F.2d 1026, 1030 (4th Cir.), cert. denied, 101 S.Ct. 98 (1980); United States v. Aleman, 609 F.2d 298, 303-04 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v. Mandel, 415 F.Supp. 997, 1018-20 (D.Md. 1976); McCellan, The Organized Crime Act (S.30) or Its Critics: Which Threatens Civil Liberties?, 46 Notre Dame Law. 55, 142-44 (1970). While Congress, in enacting RICO, focused on the type of activities commonly engaged in by organized crime, § 1962 of the Act was written to "make[s] unlawful such activities no matter who engages therein." United States v. Campanale, 518 F.2d at 363. Nor did Congress intend to remove from the coverage of the Act behavi-

or that would otherwise constitute "racketeering activity," as defined in § 1961 (1), solely because it was not engaged in for personal profit. See, e.g., United States v. Field, 432 F.Supp. 55, 57-58 (S. D.N.Y. 1977), aff'd, 578 F.2d 1371 (2d Cir. 1978).

Moreover, to create an exception for conduct that is not part of a "racketeering scheme," as that term may be commonly used, would create substantial uncertainty in the law and raise significant questions as to the constitutionality of the Act. In United States v. Culbert, 435 U.S. 371 (1978), for example, the defendant argued that proof of "racketeering" was an element of a Hobbs Act violation. While acknowledging that the Hobbs Act was aimed primarily at racketeering activities, the Court rejected the defendant's argument, emphasizing that the Act was written in broad

language and the legislative history revealed no intention to limit the statutory language. In addition, the Court noted that due process requires that a statute define the elements of a crime with sufficient clarity that "persons of common intelligence [will not] necessarily guess as to its meaning and differ as to its application." Id at 374, quoting Connally v. General Construction Co., 269 U.S. 385, 391 (1926). Thus, the Court cautioned that serious due process problems would be raised if a general undefined term like "racketeering" was read into the statute. Id. at 374.

Like the Second Circuit, we are not unmindful that "the potentially broad reach of RICO poses a danger of abuse where the prosecutor attempts to apply the statute to situations for which it was not primarily intended." United States v. Weisman, 624 F.2d 1118, 1123 (2d Cir.), cert. denied,

101 S.Ct. 209 (1980), quoting United States v. Huber, 603 F.2d 387, 395-96 (2nd Cir. 1979). We, too, "caution against undue prosecutorial zeal in invoking RICO." Id. The defendants in this case, however, would have us substitute their own definition of racketeering for the one provided by § 1961 of the Act. This we cannot do.

11. The district court quotes Rewis v. United States, 401 U.S. 808, 812 (1971), for the proposition that an "expansive interpretation of the Travel Act would alter sensitive federal-state relationships, [and] could over-extend federal police resources . . . ." In Rewis, the Court held that conducting a gambling establishment frequented by out-of-state bettors does not, without more, violate the Travel Act. In the recent case of Perrin v. United States, 444 U.S. 37 (1979), however, the Court rejected a claim that the

concerns for federalism expressed in Rewis require a narrow interpretation of the Travel Act. The issue in Perrin was whether the Travel Act proscribed commercial bribery that violated state law. In holding that it did, the Court noted that:

> So long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement. In defining an 'unlawful activity,' Congress has clearly stated its intention to include violations of state as well as federal bribery law. Until statutes such as the Travel Act contravene some provision of the Constitution, the choice is for Congress, not the courts.

Id. at 318.

12. The district court below cited a number of circuit court decisions in support of an across-the-board exemption derived from Enmons. We find these cases inapposite. United States v. Quinn, 514

F.2d 1250 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976), affirmed a conviction under the Hobbs Act for receiving payoffs from an employer in return for calling off a picket line at the employer's store. The court noted that although a bona fide labor dispute existed and the defendant was authorized to represent the employees, the payment was received in violation of § 302 of the Taft-Hartley Act and therefore could not be in pursuit of legitimate labor objectives. There was no discussion in Quinn of the applicability of Enmons to any federal statute other than the Hobbs Act.

United States v. Cerilli, 603 F.2d 415 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980), affirmed a conviction under the Hobbs Act for extorting political contributions. The court noted that the Enmons decision was the result of the unique legislative history of the Hobbs Act

and must be applied cautiously outside the labor context. Id. at 419-20. There is nothing in the Third Circuit's opinion to suggest that Enmons creates a general exemption from federal criminal law for violence in furtherance of legitimate labor goals. Similarly, the other cases cited by the district court provide no support for its holding that "absent specific authorization from Congress, United States v. Enmons precludes federal criminal prosecution for violent activity which occurs during the course of a legitimate labor dispute." Thordarson, 487 F.Supp. at 995. 13. State tort law may also be available to award compensation for damages resulting from violent conduct during the course of a strike. See Automobile Workers v. Russell, 356 U.S. 634 (1958); San Diego Unions v. Garman, 359 U.S. 236, 247-49 (1959).

14. Section 241 provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . they shall be fined not more than $10,000 or imprisoned not more than 10 years.

15. For the text of § 501(c), see footnote 3, supra.

16. In considering whether the indictment alleged these elements, the district court found that "[i]t is unlikely that there was a fraudulent intent to deprive the union of its funds"; that the expenditures were authorized under the unions' constitutions; that there was concededly "no evidence that union funds were used for the defendants' personal benefit"; and, following Enmons, that violent and illegal means for legitimate union ends "are for the union's benefit." United States v. Thordarson, 487 F.Supp.

991, 998 (C.D. Cal. 1980).

At issue at this stage of the litigation, of course, is the sufficiency of the indictment, not the sufficiency of the government's evidence. For example, the government contends that under the international union's constitution, the expenditures were not authorized.

17. Although the district court found the Boyle decision "troubling", it sought to distinguish Boyle on its facts. Boyle, the district court found, involved an expenditure of union funds which was prohibited by criminal statute. In the present case, the specific expenditure--the reimbursement for expenses--was not prohibited by statute, only the eventual use of the money to destroy trucks was illegal, and so the district court held that Boyle did not apply. Thordarson, 487 F.Supp. at 997-98. We, however, find Boyle indistinguishable from

the present case on its facts. The §501(c) violation in Boyle involved a transfer from the United Mine Workers' (UMW) treasury to the UMW's legislative and lobbying arm. While the transfer was to facilitate the making of unlawful contributions, the transfer itself was not unlawful. See id. at 758-59 and n.8.

18. The holding in Boyle converts §501(c) from a "larceny-type" statute to a statute criminalizing union expenditures for certain purposes. Such a reading would make criminal certain breaches of fiduciary duty despite the absence of a specific intent to deprive the union of its funds. We find no support in the legislative history for such a reading of the statute.

First, the precursors to §§ 501(a) and 501(c) were added to the Act at different times. These precursors are first found in S. 1555, 86th Cong., 1st Sess.

(1959). Section 109(a) of S. 1555, as reported from the Committee on Labor and Public Welfare on April 14, 1959, is almost identical to § 501(c). See 105 CONG. REC. 5980 (1959). There was no federal fiduciary obligation in the bill at that time. See S. REP. NO. 187, 86th Cong., 1st Sess. (1959), reprinted in [1959] U.S. CONG. & AD. NEWS, 2318, 2376-77 (minority views). A fiduciary obligation was added to the bill by an amendment proposed by Senator McClellan, 105 CONG. REC. 6525, on April 23, 1959, as § 509, and later renumbered § 609. 105 CONG. REC. 6523,28 (1959). The subsequent House bill, H.R. 8342, included § 109(a) of S. 1555 almost verbatim as § 501(c), but strengthened the fiduciary obligation by replacing § 609 of S. 1555 with § 501(a). See 105 CONG. REC. 15549-50 (1959) (remarks of Rep. Bolling); Id. at 15888 (text of H.R. 8342).

Second, the legislative history states that § 501(b), and not § 501(c), was meant to be the enforcement provision for § 501(a). The discussion of fiduciary duties in the analysis of H.R. 8342 discusses § 501(b) as the enforcement provision for § 501(a) and fails to mention § 501(c). See H.R. REP. NO. 741, 86th Cong., 1st Sess. (1959) reprinted in [1959] U.S. CODE CONG. & AD. NEWS 2424, 2479-80 (Supplementary views). The Senate Republicans' remarks on the conference bill, reported by Senator Goldwater, state that the purpose of § 501(c) is to make embezzlement and other thefts of union funds federal crimes as well as state crimes, while the purpose of § 501(b) is to enforce the fiduciary duty of union officials. See 105 CONG. REC. 19766 (1959) remarks of Sen. Goldwater).

19. The issue on appeal in Andreen was

the sufficiency of the evidence for a conviction under 18 U.S.C. § 664. The court treated the case as though it were a § 501 (c) conviction because § 664, which relates to employee welfare and pension plans, uses language that parallels § 501(c).

20. The key language in 29 U.S.C. § 501(c) is "embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or to the use of another." The comparable language in 18 U.S.C. § 641 is "embezzles, steals, purloins, or knowingly converts to his use or the use of another"; the language in 18 U.S.C. § 656 and § 657 is "embezzles, abstracts, purloins, or wilfully misapplies."

21. The Senate Minority Report on S. 1555 states that § 109(a), the precursor to § 501(c), does nothing more than make the state crimes of embezzlement and theft federal crimes for union officials, and

does not give union members any additional protection. S. REP. NO. 187, 86th Cong., 1st Sess. (1959), reprinted in U.S. CODE CONG. & AD. NEWS 2318, 2401 (Minority views, Appendix B). Senator Goldwater, commenting on this section, renumbered 209(a), stated that it merely created "concurrent jurisdiction" and was "like gilding the lily." 105 CONG. REC. 10099 (remarks of Sen. Goldwater). We have found nothing in the legislative history to contradict these remarks. See also note 18 supra.

22. The elements of embezzlement, when codified in a statute such as 18 U.S.C. § 641, are:

> (1) a trust or fiduciary relationship, (2) that the property claimed embezzled is embraced within the meaning of the statute, (3) that it came into the possession or care of accused by virtue of his employment, (4) it is property of another, (5) that his dealing therewith constituted a fraudulent conversion or

> appropriation of same to his own use, and (6) such was the intent to deprive the owner thereof.

United States v. Powell, 294 F.Supp. 1353, 1355 (E.D. Va. 1968), aff'd, 413 F.2d 1037 (4th Cir. 1969).

The elements of common law larceny are (1) a wrongful taking and carrying away (asportation), (2) of the personal property of another, (3) with the fraudulent intent to deprive the owner of his property without his consent. United States v. Barlow, 470 F.2d 1245, 1251 (D.C. Cir. 1972); see also Morissette v. United States, 342 U.S. 246, 267 n.28 (1952). Larceny is usually incorporated in a federal theft statute in a broadened form by means of the words "steal" or "purloin": "Stealing, having no common law definition to restrict its meaning as an offense, is commonly used to denote any dishonest transaction whereby one person obtains that which rightfully

belongs to another, and deprives the owner of the rights and benefits of ownership, but may or may not involve the element of stealth usually attributed to the word purloin." Morissette, 342 U.S. at 268 n.28, quoting Crabb v. Zerbst, 99 F.2d 562, 565 (5th Cir. 1938). Conversion is even broader than stealing, since it can be accomplished without a wrongful taking (where the converter's initial possession was lawful) and without any intent to keep possession, so long as the property is misused or abused. Morissette, 342 U.S. at 271-72.

Thus the addition of elements of lack of authorization or lack of union benefit is directly counter to the thrust of the federal theft statutes to eliminate the technicalities of the common law offenses. See generally Id. at 263-73.

23. Although Morissette does not explicitly state that conversion is an element

of § 641, that is the effect of Morissette's reasoning. Morissette states that "[p]robably every stealing is a conversion," 342 U.S. at 271, and then shows that a stealing is a conversion with the added elements of a wrongful taking and an intent to retain possession. Id. at 272. Embezzlement and purloining, the other two offenses combined to make § 641, are also conversions with other elements added: to purloin is to steal with the element of stealth, id. at 268 n.28, and conversion is an established element of embezzlement. See, e.g., United States v. Powell, supra, 294 F.Supp. at 1355. It is thus clear from Morissette that any violation of § 641 must involve a conversion.

24. We recognize that there appears to be considerable support in other circuits for the defendant's position that there are additional essential elements to § 501(c)--

although we note that those circuits fail to agree on what the additional elements are. The Sixth Circuit has adopted the view that § 501(c) does not require a showing of lack of authorization or lack of union benefit, but does require a showing of fraudulent intent and a lack of good faith belief in authorization and union benefit. United States v. Bane, 583 F.2d 832 (6th Cir. 1978), cert. denied, 439 U.S. 1127 (1979). The Fifth Circuit has held that the elements of § 501(c) include fraudulent intent and either actual lack of authorization or lack of a good faith belief in union benefit. United States v. Dixon, 609 F.2d 827 (5th Cir. 1980); see also United States v. Nell, 526 F.2d 1223 (5th Cir. 1976) (fraudulent intent and lack of authorization sufficient). But see United States v. Durnin, 632 F.2d 1297, 1300 & n.5 (5th Cir. 1980) (suggesting that

authorization is irrelevant if fraudulent intent is "thoroughly established"). The Eighth Circuit agrees that fraudulent intent and lack of authorization are sufficient, but has reserved the issue as to what elements in addition to fraudulent intent are required if the expenditure is authorized. United States v. Goad, 490 F. 2d 1158 (8th Cir.), cert. denied, 417 U.S. 945 (1974). Finally, the Second Circuit has held that the elements of § 501(c) are fraudulent intent and either lack of authorization (or ratification) or lack of good faith belief in union benefit. United States v. Santiago, 528 F.2d 1130, 1133-34 (2nd Cir.), cert. denied, 425 U.S. 972 (1976). But see United States v. Silverman, 430 F.2d 106, 117-18; 126-27 (2nd Cir.), modified on other grounds, 439 F.2d 1198 (1970), cert. denied, 402 U.S. 953 (1971) (Judge Moore suggests lack of actual union

benefit, and not a lack of belief in union benefit, is required if authorization is present; Judges Friendly and Hays agree arguendo).

Like Judge Larson, we are "not certain why courts began to add new elements to § 501(c) crimes," Marolda, 615 F.2d at 873, but we suspect that the procedural posture of each case has had an effect. Ours appears to be the first case involving a government appeal from the dismissal of the indictment for failure to allege essential elements of the offense. Preceding § 501(c) cases have involved post-conviction appeals when issues relating to lack of authorization or lack of union benefit turned on the circumstances of the particular case, such as the jury instruction, or the evidence actually adduced at trial. See, e.g., United States v. Dixon, 609 F. 2d 827 (5th Cir. 1980); United States v.

Nell, 526 F.2d 1223 (5th Cir. 1976); United States v. Ottley, 509 F.2d 667 (2d Cir. 1975); United States v. Bane, supra; United States v. Goad, 490 F.2d 1158 (8th Cir.), cert. denied, 417 U.S. 945 (1974).

For example, United States v. Silverman, supra, considered as the seminal case on the question of the elements of § 501 (c), see, e.g., Goad, supra, and Ottley, supra, involved challenges both to the indictment and to the sufficiency of the evidence. The indictment in Silverman, like the indictment in the present case, merely tracked the language of § 501(c) and then gave the dates and amounts involved in the transaction underlying each count of the indictment. Silverman, 430 F.2d at 109-110. Neither lack of authorization nor lack of union benefit was specifically alleged. The indictment, challenged on other

grounds, was upheld. Judge Friendly, however, writing for the majority, held that the evidence concerning an expenditure of union funds for a local political campaign was insufficient to sustain a § 501 (c) conviction where the union had authorized the expenditure and the expenditure benefited the union. Silverman, 430 F.2d at 126-28. The discussion of authorization is confined strictly to the issue of the sufficiency of the evidence.

25. The district court, in discussing the fraudulent intent issue, stated that "[i]t is unlikely that there was a fraudulent intent to deprive the union of its funds because reimbursement for the expenses incurred in labor organizing, and particularly strike-oriented activities, are probably not for acts 'that the union would not have wanted . . . done.'" United States v. Thordarson, supra, 487 F.Supp. at

998. This suggests that the district court may have dismissed the indictment not because the indictment failed to allege fraudulent intent, but because the court doubted that fraudulent intent could be proved at trial. If this was the district court's reasoning, it was in error. An indictment is sufficient if it adequately alleges the elements of the offense and fairly informs the defendant. See Hamling v. United States, supra, 418 U.S. at 117 and United States v. Bailey, supra, 444 U.S. at 414. The strength of the government's case is not at issue. However difficult it may be to prove fraudulent intent on the facts of this case, the government is entitled to an opportunity to present its proof.

The government admitted at oral argument that unless this circuit follows the rule in United States v. Boyle, supra

(fraudulent intent is presumed where the union funds are spent for an unlawful purpose), the government has little hope of establishing criminal intent in this case. We have declined to follow Boyle. We do not, however, interpret the government's statement as a concession that we can appropriately reverse the district court only if we decide to follow Boyle. The government's underlying contention is that the indictment sufficiently alleged all of the elements of § 501(c). We hold that the indictment is indeed sufficient. If the government concludes that it does not have adequate proof of fraudulent intent without use of the Boyle doctrine, it is free to use its prosecutorial discretion not to proceed on the § 501(c) counts.

PREGERSON, Circuit Judge (concurring and dissenting): Because section 501(c) of the Landrum-Griffin Act is expressly designed to regulate the conduct of union officials in the use of union funds, I agree that the district court erred in dismissing those counts of the indictment that charged violations of section 501(c), and join in Parts I and III of the court's opinion. I cannot agree, however, with the majority's view of the scope of United States v. Enmons, 410 U.S. 396 (1973). I believe that the rationale animating Enmons precludes the application of RICO, the Travel Act, or 18 U.S.C. § 844(i) to violence incidental to a legitimate labor dispute. Accordingly, I dissent from Part II of the majority's opinion.

The majority distinguishes Enmons from the case at bar by reading it as based on the specific language and legislative his-

tory of the Hobbs Act. I agree with the district court, however, that "it is inaccurate to so narrowly limit the case." United States v. Thordarson, 487 F.Supp. 991, 992-93 (C.D. Cal. 1980). The Court in Enmons explicitly stated that even had the language and history of the Hobbs Act not precluded its application to violence during legitimate labor disputes, policy reasons would make such application improper. 410 U.S. at 411. The Court voiced its reluctance, absent unmistakably compelling statutory language, to conclude "that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes." Id. This policy is as appropriate here as in Enmons and counsels against extending RICO, the Travel Act, or section 844(i) to "the use of force to achieve legitimate collective-bargaining demand." 410 U.S. at 408.

The majority neglects this policy consideration. The only policy argument stated in Enmons that the majority acknowledges is that "the special characteristics of the crime of extortion" made the Court fear that applying the Hobbs Act to labor disputes risked transforming minor picket line violence into federal crimes. The majority scarcely recognizes that applying the Travel Act or RICO to labor disputes creates the same risk, since extortion is one of the "unlawful activities" to which the Travel Act applies and is included in RICO's definition of "racketeering activity."[1]

More serious, however, is the majority's failure to appreciate that the Enmons decision rests not solely on the interpretation of the particular statute involved there, but on a broad, historically justified concern that the federal government

not intrude into the business of policing the orderly conduct of legitimate labor disputes. Punishing lawlessness perpetrated during labor disputes has historically been and should continue to be the province of the States and their law enforcement authorities. I therefore respectfully dissent from Part II of the court's opinion.

FOOTNOTE

1. The Travel Act penalizes anyone who travels in interstate commerce with intent to carry on an "unlawful activity. 18 U. S.C. § 1952(a)(3). And it includes extortion in its definition of "unlawful activity." 18 U.S.C. § 1952(b). RICO prohibits "racketeering activity" in various contexts, 18 U.S.C. § 1962, and extortion chargeable under state law is explicitly included in the definition of such activity. 18 U.S.C. § 1961(1)(A).

The majority does acknowledge this problem but suggests that Enmons "arguably should be extended to . . . limit the scope of the RICO and Travel Act extortion provisions." Majority Opinion, note 9. This concession makes it clear that Enmons cannot be read as based solely on the legislative history of the Hobbs Act.

APPENDIX B

APPENDIX B

FILED
March 17, 1980
Clerk, U.S.
District Court
Central District
of California

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
v.	)
	)
STEN THORDARSON,	)
MARTIN FRY,	)
CRAIG DUNBAR,	)
MARTIN SALGADO, and	)
CHARLES WISE,	)
	)
Defendants.	)
	)

No. CR 79-946-RMT

O P I N I O N

I

FACTUAL BACKGROUND

In 1978, Teamsters Local 186 and 389 ("Local") attempted to organize employees

of Redman Moving and Storage Company ("Redman") located in Thousand Oaks, California. After being elected as the bargaining agent for Redman employees in July of 1978, Local 186 ordered a strike against Redman. Since Local 186 did not, by itself, have the requisite manpower to conduct the strike, it obtained the assistance of Local 389. Between July and December of 1978, Redman's truck fleet was the object of vandalism, including tire slashings and truck burnings.

In November of 1979, after a fourteen-month investigation, Sten Thordarson, Craig Dunbar and Charles Wise, secretary-treasurer, business agent, and vice-president, respectively, of Local 389, and Martin Fry and Martin Salgado, secretary-treasurer and trustee, respectively, of Local 186, were indicted on ten counts for

violations of 18 U.S.C. §§ 1952, 844(i), and 1962(d) and 29 U.S.C. § 501(c) in connection with the burning of two Redman trucks in Arizona and Connecticut. The defendants have moved to dismiss the entire indictment.

II.

COUNTS 4 AND 5 OF THE INDICTMENT, BROUGHT UNDER 18 U.S.C. § 1952, ARE DISMISSED.

Defendants move to dismiss Counts 4 and 5 of the indictment charging them with violations of 18 U.S.C. § 1952,[1] relying on the Supreme Court's ruling in United States v. Enmons, 410 U. S. 396 (1973). The defendants in Enmons were charged with using threats of force and violence during a strike action to obtain higher wages and benefits for union

members, in violation of the Hobbs Act, 18 U.S.C. § 1951.[2] The defendants allegedly blew up a transformer substation, fired high powered rifles at three company transformers, and drained oil from a company transformer. The court held that the alleged acts did not amount to a "wrongful taking" necessary for a § 1951 extortion violation because violence was used to achieve legitimate union objectives, such as higher wages in return for genuine services which the employer seeks. Enmons, 410 U.S. at 400.

The government's major attempt to distinguish Enmons from the case at bar is its insistence upon limiting that case to merely an interpretation of the term "extortion" in § 1951. Because § 1952 does not contain the "wrongful taking" element of § 1951, it is argued, Enmons

is inapplicable to a § 1952 prosecution.

However, after a careful reading of Enmons and its progeny, it is inaccurate to so narrowly limit the case. The ruling in Enmons was based upon the underlying purpose of § 1951 which was to deal with, inter alia, labor racketeering activities.

In reviewing the language and legislative history of the Hobbs Act, the court found no congressional intent to extend federal criminal jurisdiction to include violent acts done in pursuit of legitimate union objectives or to put the federal government in the business of policing the orderly conduct of strikes. Enmons, 410 U.S. at 408-12. In fact, the issue upon which certiorari was granted in Enmons, was not whether violent activity during strikes may constitute extortion under § 1951, but whether

§ 1951 "proscribes violence during a lawful strike for the purpose of inducing an employer's agreement to legitimate collective bargaining demands." Enmons, 410 U.S. at 399. The court concluded that the state court was the proper forum for such a prosecution.[3]

The court further concluded that even if the language and history of the Hobbs Act were less clear, a § 1951 prosecution would have been improper for two related reasons. First, criminal statutes must be strictly construed, with any ambiguity being resolved in favor of lenity. Rewis v. United States, 401 U.S. 808, 812 (1971). Second, unless Congress clearly conveys its purpose, the court will not assume "a significant change in the sensitive relation between federal and state criminal jurisdiction. United States v. Bass, 404

U.S. 336, 349 (1971)." Enmons, 410 U.S. at 411-412.

Clearly, a labor official, merely by virtue of his position, is not exempt from all federal prosecution. Labor officials have been federally prosecuted for abusing their power to order picketing or strikes for the purpose of extracting money for their personal benefit. United States v. Daley, 564 F.2d 645 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978); United States v. Quinn, 514 F.2d 1250 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). Federal criminal prosecution is also not precluded where violence is used in an attempt to force an employer to pay for work which the worker had no intention of performing. United States v. Kemble, 198 F.2d 889 (3d Cir.), cert. denied, 344 U.S. 843 (1952). Such

labor racketeering is precisely the activity which § 1951 was intended to curb. However, § 1951 is inapplicable to "violence employed during the course of a valid, bona fide collective bargaining negotiation for better working hours, wages and conditions." United States v. Caldes, 457 F.2d 74, 77 (9th Cir. 1972).

Rather than limiting the Enmons ruling to extortion cases, subsequent courts have consistently recognized that the case was explicitly tied to the labor context. Short of express congressional intent, "the effect of Enmons was to remove from the reach of federal criminal law the use of coercive tactics to obtain increased wages . . . when the payment is gained in furtherance of legitimate objectives." United States v. Quinn, 514 F.2d 1250, 1257 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). See also, United States

v. Cerilli, 603 F.2d 415, 419-20 (3d Cir. 1979). Thus, if Enmons is to be narrowly construed at all, it is only done so within the context of legitimate labor activity. United States v. Culbert, 435 U.S. 371, 376-78 (1978); United States v. Warledo, 557 F.2d 721 (10th Cir. 1977); United States v. Jacobs, 543 F.2d 18 (7th Cir. 1976), cert. denied, 431 U.S. 929 (1977).

The courts have similarly delimited the reach of the Travel Act, 18 U.S.C. § 1952. Several courts have stated that the primary purposes of § 1952 are to attack organized crime and to aid local authorities in combatting it. United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974), cert. denied, 419 U.S. 1120 (1975); United States v. Peskin, 527 F.2d 71 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976). An extensive analysis of the

legislative history of § 1952 is found in United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971). The Ninth Circuit stated that, "it is quite clear that in enacting § 1952, Congress was not concerned with regulating interstate travel or the use of interstate facilities, but rather with directly suppressing unlawful local activities from which organized crime drew its sustenance." Roselli, 432 F.2d at 891; United States v. Colacurcio, 499 F.2d 1401, 1406 (9th Cir. 1974).

The Supreme Court in Rewis v. United States, 401 U.S. 808 (1971), stated that:

> The legislative history of the [Travel] Act is limited, but does reveal that § 1952 was aimed primarily at organized crime and, more specifically, at persons engaged in one state while operating or managing illegal activities in another. . . [A]n expansive interpretation of the Travel

> Act would alter sensitive federal-state relationships, could overextend federal police resources and would transform relatively minor state offenses into federal felonies.

Rewis, 401 U.S. at 812.

Rewis[4] was followed in United States v. Brecht, 540 F.2d 45 (2d Cir. 1976), cert. denied, 429 U.S. 1123 (1977), in which § 1952 was not extended to acts of commercial bribery, even though bribery was a § 1952 offense. "The inquiry into whether the state violation committed by the defendant comes within the scope of the Travel Act depends not upon the nomenclature used but upon the nature of the violations." Brecht, 540 F.2d at 50. The court observed that § 1952 was primarily intended to counter methods used by organized crime to generate income, such as "shakedowns" or "loan-sharking." United States v. Nardello, 393 U.S. 286 (1969).

Citing Enmons as to the rule of lenity, the Brecht court refused to consider commercial bribery within the ambit of § 1952.

The Enmons rationale is as appropriate to a § 1952 prosecution as it is to a § 1951 prosecution.[5] Defendants, in the case at bar, are labor officials whose unions participated in a lawful strike. Their alleged acts are ones contemplated as part of a series of coercive tactics to achieve the recognition of a union contract. Although, as in Enmons, the statutory proscriptions arguably apply,[6] there is no indication that Congress intended to extend the scope of a statute aimed at combatting organized criminal activity to encompass violence arising out of a lawful strike. Criminal statutes must be strictly construed, and any ambiguity resolved in favor of lenity. Enmons,

410 U.S. at 411. Much more explicit statutory language is required "to lead to the conclusion that Congress intended to put the federal government in the business of policing the orderly conduct of strikes." Id.

The indictment is an attempt to circumvent the Enmons proscription similar to the one rejected by the Second Circuit in United States v. DeLaurentis, 491 F.2d 208 (2d Cir. 1974). In DeLaurentis, the government attempted to invoke a civil rights statute to gain federal jurisdiction over violent activity which had occurred during a lawful labor dispute. The court found that explicit provisions of the National Labor Relations Act, and not the civil rights statute, controlled regulation of the alleged acts. Relying on Enmons, the court concluded that "the Government has unjustifiably used federal

law to convert an unfair labor practice into a criminal conspiracy." DeLaurentis, 491 F.2d at 214. See, United States v. Bailes, 120 F.Supp. 614, 637 (S.D.W.Va. 1954).

Acts of violence, such as the ones alleged in the instant case, occurring during a lawful labor dispute and resulting in damage to persons or property are punishable under state law. However, there is nothing in the language or history of § 1952 to "justify the conclusion that Congress intended [§ 1952] to work such an extraordinary change in Federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States." Enmons, 410 U.S. at 411. Therefore, Counts 4 and 5 charging violations of 18 U.S.C. §1952 are dismissed.

III.

COUNTS 2 AND 3 OF THE

INDICTMENT, BROUGHT UNDER 18 U.S.C. § 844(i), ARE DISMISSED.

Defendants Fry and Salgado are charged with violations of 18 U.S.C. § 844(i).[7] As discussed, supra, absent specific authorization from Congress, United States v. Enmons, supra, precludes federal criminal prosecution for violent activity which occurs during the course of a legitimate labor dispute. § 844(i), enacted as part of the Organized Crime Control Act of 1970 (P.L. 91-452), does not provide such authorization.[8]

Although the application of § 844 may not be limited solely to organized crime, there is clearly no indication of any intent by the Congress to extend federal criminal prosecution into the labor field. In fact, any such congressional intent is even less apparent in

§ 844 than in the Hobbs Act which was considered in the Enmons case, supra.[9] Thus, a consistent application of the Enmons doctrine is appropriate to a § 844 prosecution. Accordingly, Counts 2 and 3 charging violations of 18 U.S.C. § 844(i) are dismissed.

IV.

COUNTS 6 THROUGH 10 OF THE INDICTMENT, BROUGHT UNDER 29 U.S.C. § 501(c), ARE DISMISSED.

Defendants are also alleged to have violated 29 U.S.C. § 501(c)[10] by authorizing and using union funds to pay for travel, telephone, and unspecified expenses incurred in trips to Arizona and Connecticut for the unlawful purpose of locating and destroying two Redman trucks. The government's theory is that a violation of § 501(c) is established when the

union official utilizes union funds for an unlawful purpose, regardless of the existence of any arguable union benefit.

The leading case is United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), cert. denied, 402 U.S. 953 (1971). The defendant was indicted for embezzlement in violation of § 501(c) and charged in Counts 1 through 8 with diverting union funds for the payment of printing expenses incurred in the campaign of Abraham Beame for mayor of New York under the guise of a payment for union stationery and in Counts 10 through 13, for receiving four checks from the union under the pretense of a steward's committee expense. Judge Moore wrote the majority opinion involving Counts 10 through 13 and dissented from Judge Friendly's opinion involving Counts 1 through 8.

The court noted initially that the purpose of § 501(c) was to hold union officials strictly responsible as fiduciaries for the union funds entrusted to them and, therefore, to require them to expend those funds only in accordance with the union's constitution, by-laws, and resolutions. The two judges differed, however, as to the standards for a § 501(c) conviction.

Judge Moore stated that because the political contributions in Counts 1 through 8 were not per se illegal, it was necessary to focus on the issue of whether the contributions were properly authorized and made for the union's benefit. If there is no possible union benefit from the use of the funds (e.g., personal non-business expenses not incurred in furtherance of union business, United States v.

Dibrizzi, 393 F.2d 642 (2d Cir. 1968), it makes no difference whether the use was authorized. Judge Moore held that a conviction under § 501(c) may be obtained by demonstrating a fraudulent intent to deprive the union of its funds and either a lack of authorization or an absence of benefit to the union. Believing that there was sufficient evidence for the jury to find that the contributions were either for the private benefit of the defendant or made with only a sham or invalid authorization from the union, Judge Moore voted to affirm the convictions in Counts 1 through 8.

However, the majority opinion by Judge Friendly observed that § 501(c) is essentially a larceny-type offense which amounts to the taking of another person's property or causing it to be taken, knowing

that the other person would not have wanted that to be done. The "unlawful and wilful" element of the offense requires that the funds be used for the converter's personal benefit (or for the personal benefit of another) and not for the benefit of the union. Judge Friendly stated that assuming, arguendo, that Judge Moore's standard was adopted, the union did benefit from the political contributions and, in view of the fact that the union's constitution contemplated political contributions, there was no fraudulent intent to deprive the union of its funds nor lack of bona fide authorization.

Finally, the payments in Counts 10 through 13 were clearly for the personal benefit of the defendant. The entire court upheld the conviction on these counts because there was sufficient evidence for

the jury to conclude that there was no proper authorization for the payments.

As explained in United States v. Goad, 490 F.2d 1158 (8th Cir.), cert. denied, 417 U.S. 945 (1974), Silverman, supra, may be analyzed as applying different standards for authorized and unauthorized expenditures. Because Judge Moore's opinion dealt with the unauthorized uses, the elements in a § 501(c) conviction for such uses can be characterized as requiring (1) a fraudulent intent to deprive the union of its funds, and (2) a lack of authorization according to the union's constitution and by-laws. On the other hand, Judge Friendly's opinion adopted Judge Moore's standard arguendo concerning the authorized uses. Under those circumstances, the standard required is (1) a fraudulent intent to deprive the

union of its funds, and, (2) an absence of benefit to the union.[11]

The government relies primarily on United States v. Boyle, 482 F.2d 755 (D.C. Cir.), cert. denied. 414 U.S. 1076 (1973). In Boyle, the defendant converted union funds into campaign contributions in direct violation of 18 U.S.C. § 610 [making it unlawful for any labor organization to contribute to a federal political campaign]. The court distinguished Silverman on the grounds that in the case there was no legal bar to the use of the funds if the transfer was properly authorized by the union. But in Boyle, the use to which the money was converted was itself unlawful and, therefore, not even an authorization could have made the contribution legal.

The court further rejected defendant's claim that the jury must find that

the union official knew at the time that the expenditure was illegal or ultra vires:

> As we have noted, however, the transfer in this case was not for a purpose that was ultra vires, but rather for a purpose that was itself a crime. There is no hint in either the statute or its legislative history that indicates a Congressional intent to excuse from the ambit of § 501(c), transfers for a criminal purpose. No officer or union governing body could in all logic believe that a transfer for a criminal purpose was for legitimate union purposes, was authorized by the union constitution or by-laws, or was for the union's benefit.

Boyle, at 765.

The government interprets Boyle as establishing a § 501(c) violation whenever the funds are utilized for an "unlawful purpose." However, the government's interpretation is overly broad. Specifically, the use of this "broad" interpretation in the context of labor organizational activities and strikes is trou-

bling. Taken to its logical conclusion, the government's theory would consider as an embezzlement indictable under § 501(c), any union expenditures made to reimburse members or other individuals who ultimately violate certain state laws through acts that might reasonably occur during the labor dispute, such as disturbance of the peace, assault, or vandalism. For example, unions often hire professional picketers. If these picketers participate in "unlawful activities" that occur during legitimate labor activities, the union officials who authorized the expenditure for the hiring of the picketers could conceivably be prosecuted under § 501(c). If a union officer reimbursed organizers for gasoline, hotel and other expenses, and these organizers participated in the identical activities as did the union workers in Enmons, supra, (blowing up a

transformer substation, firing high-powered rifles at three company transformers, and draining the oil from a company transformer) there would exist the anomalous situation wherein the federal government would be precluded from indicting the union officials who commit violent acts in pursuit of legitimate labor objectives, but would be able to convict the union officials on the basis that any funds expended toward those legitimate labor objectives would constitute a § 501(c) embezzlement.

Although Boyle, supra, is persuasive, it is not binding on this court. Boyle can, however, be distinguished because the "use" to which the funds were converted was per se illegal. In the case at bar, reimbursement for expenses incurred for union benefit are not per se illegal. As indicated above, Boyle is overly broad

and involved special circumstances that were not necessarily applicable to the Silverman standard.[12]

The Silverman standard is the appropriate standard to apply to the facts of this case. The constitutions of both unions contain provisions authorizing reimbursements for expenses incurred while performing union business.[13] The secretary-treasurers of both unions have the authority to reimburse union organizers for expenses incurred for out-of-town trips pursuant to activities that are of benefit to the union. As such, these expenses can reasonably be considered as authorized.

The factors to consider in determining whether authorized expenditures are violations of § 501(c) are the fraudulent intent of the defendant and his good faith belief that the funds were expended

for the union's benefit. It is unlikely that there was a fraudulent intent to deprive the union of its funds because reimbursement for the expenses incurred in labor organizing, and particularly strike-oriented activities, are probably not for acts "that the union would not have wanted. . . done." United States v. Ottley, 509 F.2d 667 (2d Cir. 1975); United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), cert. den. 402 U.S. 953 (1971); United States v. Hart, 417 F.Supp. 1314, 1322 (S.D. Iowa 1976). Further, the government concedes that it has no evidence that union funds were used for the defendants' personal benefit. Finally, it is clear from United States v. Enmons, 410 U.S. 396 (1973), that violent means, even if in violation of state law, used to achieve legitimate labor objectives, are for the union's benefit. Accordingly,

Counts 6 through 10 charging violations of 29 U.S.C. § 501(c) are dismissed.

V.

COUNT 1 OF THE INDICTMENT, BASED ON 18 U.S.C. § 1962(d), IS DISMISSED.

The § 1962(d)[14] [the RICO Statute] count shall be dismissed for two reasons. First, the Enmons doctrine, supra, is equally applicable to RICO. The Ninth Circuit in United States v. Marubeni America Corp., ___ F.2d ___ (9th Cir. No. 79-1327, January 10, 1980) reviewed the legislative history of the statute and stated:

> We believe that anyone who reads the legislative history must be struck by the single-mindedness with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of influence of organized crime. This purpose must be the linch-pin of any construction of RICO.

See, Slip Opinion, p. 1593 n.11. Clearly, RICO's jurisdiction does not extend to violent activities occurring during strikes.

Second, defendants have not engaged in any activities which constitute "labor racketeering." Furthermore, the means by which the government attempts to invoke § 1962 - violations of 18 U.S.C. §§ 1952 and 844(i) and 29 U.S.C. § 501(c) - have all been disposed of.

Therefore, Count 1 charging a violation of 18 U.S.C. § 1962(d) is also dismissed.

Dated: March 17, 1980.

ROBERT M. TAKASUGI
United States District Judge

FOOTNOTES

1. 18 U.S.C. § 1952 provides in pertinent part that:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign Commerce, including the mail, with intent to . . .
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specific in subparagraphs (1), (2), and (3), shall be fined

. . . or imprisoned . . . or both.

(b) As used in this section, "unlawful activity" means . . . (2) extortion, bribery or arson in violation of the laws of the state in which committed or of the United States.

2. 18 U.S.C. § 1951 provides in pertinent part:

'(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be

fined . . . or imprisoned . . . or both.

3. The court stated that "acts of violence occurring during a lawful strike and resulting in damages to persons or property are undoubtedly punishable under state law. To punish persons for such acts of violence was not the purpose of the Hobbs Act." Enmons, 410 U.S. at 398.

4. The court in Rewis refused to extend § 1952 to the interstate travel by mere customers of a gambling establishment.

5. The government argues that the defendants' attempt to make an exception to § 1952 is analogous to the one attempted in United States v. Erlenbaugh, 409 U.S. 239 (1972). Erlenbaugh, however, hardly stands for the proposition advocated by the govern-

ment. The court merely recognized that §§ 1952 and 1953 were both parts of the same legislative effort to assist local authorities in dealing with organized criminal activity, playing different roles in achieving the common goal. Erlenbaugh cannot possibly be construed as extending the scope of § 1952 beyond organized criminal activity and into the field of legitimate labor activity.

6. The government further attempts to distinguish Enmons on the basis that the cases do not preclude federal prosecution for violation of specific federal statutes. The government argues that because §§ 1952 and 844(i) (discussed, infra.) apply to "any person" or to "whoever" commits the unlawful act, the statutes clearly include the alleged conduct of the

defendants and are not limited to exclude certain classes of people, such as labor officials who perform unlawful acts to further union objectives. This argument is without merit. § 1951, considered in Enmons, also applies to "whoever" performs the unlawful acts. The court, nevertheless, held that the congressional intent explicitly did not extend the statute to violent activity stemming from a lawful strike.

7. 18 U.S.C. § 844(i) provides that:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned . . .

or fined . . . or both.

8. The legislative history of § 844 is unclear. There is some indication that it may have been included in the Organized Crime Control Act in response to the bombings of buildings on college campuses during the late 1960's. 1970 U.S. Code Cong. & Ad. News at 4075, 4090. § 844, however, was part of the overall congressional attempt to combat organized crime. In fact, included in the Act was 18 U.S.C. § 1962, under which defendants are also charged. See discussion, infra.

9. The Hobbs Act, 18 U.S.C. § 1951, was directed at labor racketeering activities. United States v. Daley, 564 F.2d 645 (2d Cir. 1977), cert. denied, 435 U.S. 933 (1978). There is no indication that Congress intended § 844 to be concerned with legitimate

labor activity.

10. 29 U.S.C. § 501(c) provides that:

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or assets of a labor organization of which he is an officer or by which he is employed, directly or indirectly, shall be fined . . . or imprisoned . . . or both."

11. See United States v. Bane, 583 F.2d 832 (6th Cir. 1978) cert. denied, 439 U.S. 1127 (1979), where the court stated that in a § 501(c) case in which the expenditure of union funds was authorized, the government must prove a fraudulent intent to deprive the union of its funds and a bad faith

belief that the expenditure was for the legitimate benefit of the union. The government, however, need not prove that the expenditure did not actually benefit the union. See also United States v. Santiago, 528 F.2d 1130 (2d Cir.), cert. denied, 425 U.S. 972 (1976), where the same standard was used.

12. The logical extension of the Boyle argument is that the ultimate use is a violation of § 501(c) itself (which is an unlawful act) thereby allowing some creative prosecutor to bootstrap an alleged § 501(c) violation as being the unlawful act necessary to impose the Boyle standard. To avoid the circular possibilities of Boyle, the focus as to the ultimate unlawfulness should be on the wrongful conversion. Accordingly, the standard that should

be adopted is one that concentrates on the authorization for the expenditure and the fraudulent intent of the alleged converter, rather than on the "use."

13. Local 389's constitution provides:

> The Secretary-Treasurer shall have the authority to disburse or order the disbursement of all monies necessary to pay the bills, obligations and indebtedness of the Local Union, which have been properly incurred as provided herein. He shall have the authority to pay current operating expenses of the Local Union, including rents, utilities and maintenance of the union hall, and salaries and expenses of officers and employees as authorized by the Executive Board.

--Article IX, H

He shall have general charge and supervision of all the officers and employees. . . .

--Article IX, I

Recognizing that the officers and representatives of this organization do not work regularly scheduled hours and receive no compensation for overtime or premium pay; also recognizing that such individuals are required to pay varying amounts for lodgings and meals depending upon the city to which they travel, which amounts are sometimes less, but more often more than the allowance given them, . . .; that such activities benefit the organization and its members,

that the time spent in such activities is unpredictable and unascertainable, such officers and representatives may be granted an allowance (both for in-town and out-of-town work, respectively, which in the case of out-of-town work shall include hotel and meal expenditures) in which amount (daily, weekly, or monthly) as the Local Executive Board may determine and there shall be no need to make a daily or other accounting to the local union membership for such allowances. In addition to the allowances set forth above, all officers and employees may be reimbursed for, or credit provided for, all other expenses incurred in connection with their activities.

--Article XV, A

> When a representative of the organization is engaged in activities in the intent of or for the benefit of the organization and its members, the labor organization shall pay the expenses incurred therein, or reimburse the representative upon receipt of itemized vouchers from him or the suppliers of such services.

--Article XV, B

Local 189 has similar provisions (Articles X and XV) in its constitution.

14. 18 U.S.C. § 1962(c) provides in pertinent part that:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(d) provides that:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

APPENDIX C

APPENDIX C

FILED
August 5, 1981
RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)
Plaintiff-Appellant,)
vs.)
STEN THORDARSON, MARTIN FRY,)
CRAIG DUNBAR, MARTIN SALGADO,)
and CHARLES WISE,)
Defendants-Appellees.)
)

No. 80-1239

D.C. CR 79-946

ORDER

Before: PREGERSON, FERGUSON and NORRIS, Circuit Judges

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing and

no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

APPENDIX D

18 U.S.C. § 844 Penalties

"(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicles, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title."

18 U.S.C. § 1951 Interference with commerce by threats or violence

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section --

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

"(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

"(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

18 U.S.C. § 1952 Interstate and foreign travel or transportation in aid of racketeering enterprises

"(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to --

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

"(c) Investigations of violations under

this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury."

18 U.S.C § 1961 Definitions

"As used in this chapter --

"(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1510 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphor-

nalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

"(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possesion of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

"(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

"(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering

activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;"

18 U.S.C. § 1962 Prohibited activities

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

18 U.S.C. § 1963 Criminal penalties

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, con-

trolled, conducted, or participated in the conduct of, in violation of section 1962.

"(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

"(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property

as soon as commercially feasible, making the provision for the rights of innocent persons."

18 U.S.C. § 1964 Civil remedies

"(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type or endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

"(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

"(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue

therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

"(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."

29 U.S.C. § 151 Findings and declaration of policy

"The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized scurces of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employmnet or other mutual aid or protection."

29 U.S.C. § 152 Definitions

"(9) The term 'labor dispute' includes any controvery concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

29 U.S.C. § 157 Right of Employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bar-

gaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C. § 401 Congressional declaration of findings, purposes, and policy

"(a) The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.

"(b) The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of

individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

"(c) The Congress, therefore, further finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, and have the tendency or necessary effect of burdening or obstructing commerce by (1) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (2) occurring in the current of commerce; (3) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods into or from the channels of commerce, or the prices of such materials or goods in commerce; or (4) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing into or from the channels of commerce."

29 U.S.C. § 501 Fiduciary responsibility of officers of labor organizations

Duties of officers; exculpatory provisions and resolutions void

"(a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

Violation of duties; action by member after refusal or failure by labor organization to commence proceedings; jurisdiction; leave of court; counsel fees and expenses

"(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

Embezzlement of assets; penalty

"(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of

another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
STEN THORDARSON,	)
MARTIN FRY,	)
CRAIG DUNBAR,	)
MARTIN SALGADO, and	)
CHARLES WISE,	)
Defendants.	)

No. CR 79-946

INDICTMENT

[18 U.S.C. §1962(d) Racketeering); §1952 (Interstate Travel in Aid of Racketeering); §844(i) (Damage by Explosives to Vehicles Used in Interstate Commerce); 29 U.S.C. §501(c) (Embezzlement of Union Funds)]

THE GRAND JURY CHARGES:

COUNT I

1. At all times pertinent to this indictment, Redman Moving and Storage Company (hereinafter referred to as Redman) was a business located in Thousand Oaks, California, and engaged

in the interstate transportation of goods by truck.

2. At all times pertinent to this indictment Sten Thordarson, Craig Dunbar and Charles Wise were officers and/or employees of Teamster Union Local 389; Martin Fry and Martin Salgado were officers and/or employees of Teamster Union Local 186.

3. During the period covered by this indictment International Brotherhood of Teamsters Local 186 aided by Teamsters Local 389 sought to unionize Redman employees.

4. At all times pertinent to this indictment Sten Thordarson, Craig Dunbar, Charles Wise, Martin Fry and Martin Salgado were individuals associated in fact, which association in fact constituted an "enterprise" within the meaning of Title 18, United States Code, Section 1961(4), and which enterprise was engaged in and the activi-

ties of which affected interstate commerce, that is various criminal activities including interstate travel to carry on arson in violation of Title 18, United States Code, Section 1952: arson in violation of Title 18, United States Code, Section 844(i); and embezzlement of union funds in violation of Title 29, United States Code, Section 501(c).

NATURE OF THE CONSPIRACY

1. From on or about July 1, 1978, to on or about December 1, 1978, in the Central District of California, and elsewhere,

STEN THORDARSON,
MARTIN FRY,
CRAIG DUNBAR,
MARTIN SALGADO, and
CHARLES WISE,

defendants herein, having associated with the enterprise described above, did knowingly, wilfully and unlawfully, conspire, combine, confederate and agree together and with each other and with others not named

herein, to conduct and participate directly and indirectly in the affairs of the enterprise through a pattern of racketeering activity.

2. It was a part of the conspiracy that the defendants would and did utilize fear, threats and violence, including arson and threats of arson to induce Redman Moving and Storage Company by unlawful means into recognizing the Teamsters Union.

3. It was further a part of this conspiracy that defendants Sten Thordarson, Martin Fry and Martin Salgado would and did request that teamster members locate trucks owned by Redman Moving and Storage Company and report the location to Local 186 in order to facilitate the destruction of trucks owned by Redman Moving and Storage Company.

4. It was further a part of this conspiacy that defendant Craig Dunbar would and

did follow a Redman Moving and Storage Company truck from the greater Los Angeles area to Phoenix, Arizona for the purpose of destroying that truck.

5. It was further a part of this conspiracy that defendants Craig Dunbar, Charles Wise and Martin Salgado would and did search for a Redman Moving and Storage Company truck in Phoenix, Arizona for the purpose of destroying that truck.

6. It was further a part of this conspiracy that Craig Dunbar and Martin Salgado would and did travel to Ridgefield, Connecticut, for the purpose of destroying a Redman Moving and Storage Company truck.

7. It was further a part of this conspiracy that the defendants would destroy and cause to be destroyed Redman Moving and Storage Company trucks and other equipment, which destruction was intended to drive Redman Moving and Storage Company out

of business if the unionizing effort was unsuccessful.

8. It was further a part of the conspiracy that the defendants would and did unlawfully convert and utilize funds of Local Unions 389 and 186 to finance in part unlawful acts committed in the attempt to unionize Redman Moving and Storage Company.

9. It was further a part of the conspiracy that the defendants would and did misrepresent upon the union records of Locals 389 and 186 the true disposition of the funds used to finance unlawful acts against Redman Moving and Storage Company by the defendants.

10. It was further a part of the conspiracy that the defendants would and did commit acts of racketeering which acts are set out fully in Counts 2 through 12 below and incorporated by reference herein.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the following overt acts, among others, were committed, in the Central District of California and elsewhere.

1. On August 25, 1978, Craig Dunbar purchased gasoline in Phoenix, Arizona, on a Union 76 credit card issued to Teamsters' Local 389.

2. On August 26, 1978, Craig Dunbar drove Charles Wise and Martin Salgado from Phoenix, Arizona, to Los Angeles, California.

3. On August 28, 1978, Craig Dunbar received an expense reimbursement check from Local 389 for the trip to Arizona.

4. On September 2, 1978, Craig Dunbar received a check from Local 186, payable to Martin Salgado, which check Dunbar deposited to his personal checking account.

5. On September 4, 1978, Craig Dunbar registered at the Holiday Inn Hotel in Danbury, Connecticut, under the name of C. Thomas.

6. In August of 1978, Martin Fry stated that he intended to destroy all of Redman's trucks.

7. In August of 1978, Martin Salgado told picketers to try to locate Redman trucks and to report the locations.

8. On August 25, 1978, Charles Wise purchased gasoline in Phoenix, Arizona, using a credit card issued to Local 389.

9. On September 2, 1978, Martin Salgado purchased gasoline in San Ardo, California, on an Arco credit card issued to Local 186.

10. On September 4, 1978, Sten Thordarson placed and received telephone calls between his residence and the Holiday Inn in Danbury, Connecticut.

11. On September 5, 1978, Sten Thordarson

received a telephone call from Ridgefield, Connecticut.

12. On September 5, 1978, Sten Thordarson telephoned Martin Fry.

All in violation of Title 18, United States Code, Section 1962(d).

THE GRAND JURY FURTHER CHARGES:

COUNT 2

[18 U.S.C. §§844(i) and (2)]

That on or about August 21, 1978, in the Central District of California,

MARTIN FRY and

MARTIN SALGADO,

defendants herein, each aiding and abetting the other did maliciously damage and cause to be damaged, by means of an explosive as defined by Title 18, United States Code, Section 844(j), a vehicle used in interstate commerce and in an activity affecting interstate commerce, that is a 1967 Ford truck tractor, bearing California license number 45507S.

In violation of Title 18, United States Code, Sections 844(i) and (2).

THE GRAND JURY FURTHER CHARGES:

COUNT 3

[18 U.S.C. §§ 844(i) and (2)]

That on or about August 21, 1978, in the Central District of California,

MARTIN FRY and

MARTIN SALGADO,

defendants herein, each aiding and abetting the other did maliciously attempt to damage by means of an explosive, as defined by Title 18, United States Code, Section 844(j), a vehicle used in interstate commerce and in an activity affecting interstate commerce, that is a 1971 International truck tractor, bearing California license number 1L 28726.

In violation of Title 18, United States Code, Section 844(i) and (2)

THE GRAND JURY FURTHER CHARGES:

COUNT 4

[18 U.S.C. §§1952 and 2]

On or about August 25, 1978,

CRAIG DUNBAR,
CHARLES WISE, and
MARTIN SALGADO,

defendants herein, aided and abetted by

STEN THORDARSON,

who is also named as a defendant herein, did travel in and use the facilities of interstate commerce from California to Arizona with the intent to promote and carry on, and facilitate the promotion and carrying on of an unlawful activity, that is arson in violation of Arizona Revised Statute, Section 13-233, and thereafter did commit the following acts in an attempt to promote, carry on and facilitate an arson:

1. On or about August 25, 1978, Craig Dunbar drove to Arizona from the Los Angeles, California area.

2. On or about August 25, 1978, Craig Dunbar purchased gasoline using Local 389's Union 76 gasoline credit card.

3. On or about August 25, 1978, Sten Thordarson chartered an aircraft to fly Martin Salgado and Charles Wise to Phoenix, Arizona.

4. On or about August 25, 1978, Martin Salgado and Charles Wise flew from Van Nuys, California to Phoenix, Arizona.

5. On or about August 26, 1978, Craig Dunbar purchased gasoline in Quartzsite and Tucson, Arizona using Local 389's gasoline credit cards.

6. On or about August 26, 1978, Craig Dunbar met Charles Wise and Martin Salgado in Phoenix, Arizona.

7. On or about August 25 and 26, 1978, Sten Thordarson made and received telephone calls between California and Arizona.

All in violation of Title 18, United States Code, Section 1952 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 5

[18 U.S.C. §§1952 and 2]

On or about September 5, 1978, in the Central District of California,

CRAIG DUNBAR and
MARTIN SALGADO,

defendants herein, aided and abetted by

STEN THORDARSON and
MARTIN FRY,

who are also named as defendants herein, did travel in and use the facilities of interstate commerce from California to Connecticut with the intent to promote and carry on, and facilitate the promotion and carrying on of an unlawful activity, that is arson in violation of Connecticut General Statutes, Section 53A-113, and thereafter did commit the following acts in an attempt to promote, carry on and facilitate an arson:

1. On or about September 1, 1978, Martin Fry issued union check number 10767 to

Martin Salgado, which check Fry endorsed in the name of Salgado and gave to Craig Dunbar for deposit into Dunbar's personal checking account.

2. On or about September 3, 1978, Craig Dunbar and Martin Salgado drove from Los Angeles, California to San Francisco, California.

3. On or about September 3, 1978, Craig Dunbar and Martin Salgado flew from San Francisco to the east coast.

4. On or about September 4, 1978, Craig Dunbar and another individual registered at the Holiday Inn Hotel, Danbury, Connecticut, under thename of C. Thomas.

5. On or about September 5 and 6, 1978, Craig Dunbar and another individual registered at the Midway Motor Inn, Queens, New York, under the name of C. Dunbar.

6. On or about September 5 and 6, 1978, Craig Dunbar and Martin Salgado placed

telephone calls from Queens, New York to California.

7. On or about September 4 and 5, 1978, Sten Thordarson placed and received calls between Danbury, Connecticut and Los Angeles, California.

8. On or about September 5, 1978, a 1975 cab-over Kenworth truck leased to Redman Moving and Storage Company was destroyed by arson in Rdigefield, Connecticut.

9. On or about September 5, 1978, Sten Thordarson telephoned an agent for Redman Moving and Storage Company and advised him that a Redman truck had been destroyed.

All in violation of Title 18, United States Code, Sections 1952 and 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 6

[29 U.S.C. §501(c) and 18 USC §2]

That from on or about August 25, 1978, to on or about November 30, 1978, in the Central District of California, and elsewhere,

CRAIG DUNBAR,
STEN THORDARSON, and
CHARLES WISE,

defendants herein, Sten Thordarson and Charles Wise being employed by and officers of Teamster Union Local 389, that is Secretary-Treasurer and President, respectively, and Craig Dunbar being employed by and an organizer-business agent of Local 389, each aiding and abetting the other, did embezzle, steal, and unlawfully and wilfully abstract and convert to their own use and the use of another, monies, funds, property, and other assets of Teamster Local Union 389, by authorizing and utilizing Union funds for

expenses and reimbursement of expenses incurred in a trip from California to Arizona for the unlawful purpose of locating and destroying a Redman truck, said expenses described as follows:

a. Eleven dollars and seventy-five cents ($11.75) for gasoline purchases made by Craig Dunbar on Local 389's, Union Oil credit card on or about August 25, 1978, which expenses were included in and paid for by Local 389's check dated November 18, 1978, signed and authorized by Sten Thordarson and Charles Wise.

b. Ten dollars and fifteen cents ($10.15) and five dollars ($5.00) for gasoline purchases made by Craig Dunbar and charged to Local 389's Chevron Oil credit card account on or about August 25 and August 26, 1978, which expenses were included in and

paid for by Local 389's check dated November 30, 1978, signed and authorized by Sten Thordarson and Charles Wise.

c. One hundred and one dollars and fifty-nine cents ($101.59) for expenses incurred by Craig Dunbar from on or about August 25, 1978, to on or about August 28, 1978, and paid for by Local 389's check dated August 28, 1978, and signed by Charles Wise and Sten Thordarson.

d. Long distance telephone toll expenses incurred by Craig Dunbar and Charles Wise and charged to Local 389's Pacific Telephone Co. credit card which expenses were included in and paid for by Local 389's check dated October 30, 1978, and signed and authorized by Sten Thordarson and Charles Wise.

All in violation of Title 29, United States Code, Section 501(c) and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 7

[29 U.S.C. §501(c) and 18 U.S.C. §2]

That on or about August 25, 1978, in the Central District of California, and elsewhere,

MARTIN SALGADO,
STEN THORDARSON, and
CHARLES WISE,

defendants herein, Sten Thordarson and Charles Wise being officers of Teamster Union Local 389 as described in Count 6 of this indictment, and Martin Salgado being a trustee-business agent for Teamster Union Local 389, and being employed indirectly by Teamster Union Local 389, each aiding and abetting the other, did embezzle, steal and unlawfully convert to their own use and the use of another, monies, funds, property and other assets of Teamster Union Local 389, by authorizing, receiving, and utilizing funds of Local 389 for expenses and

and reimbursement of expenses incurred in a trip from California to Arizona for the unlawful purpose of locating and destroying a Redman truck, said expenses being:

> Three hundred and eighty-seven dollars ($387.00) utilized to pay for a chartered airplane for Martin Salgado and Charles Wise, which funds were authorized and expended by Sten Thordarson by a Local 389 check dated August 25, 1978.

In violation of Title 29, United States Code, Section 501(c) and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 8

[29 U.S.C. §501(c) and 18 U.S.C. §2]

The on or about August 25, 1978, in the Central District of California, and elsewhere,

STEN THORDARSON, and
CHARLES WISE,

defendants herein, Sten Thordarson and Charles Wise being officers of Teamster Union Local 389 as described in Count 6 of this indictment, each aiding and abetting the other, did embezzle, steal and unlawfully convert to their own use and the use of another, monies, funds, property and other assets of Teamster Union Local 389, by authorizing, receiving and utilizing funds of Local 389 for expenses incurred in a trip from California to Arizona for the unlawful purpose of locating and destroying a Redman truck,

said expenses being:

a. Sixty-five dollars and seventy-nine cents ($65.79) utilized for expenses of Charles Wise, on or about August 25, 1978, which funds were expended from a three hundred dollar ($300.00) advance issued to Charles Wise and authorized by Sten Thordarson.

b. One hundred and six dollars and eighty-six cents ($106.86) for car rental expenses incurred by Charles Wise on or about August 25, 1978, and paid for by Union check dated October 31, 1978 and signed by Charles Wise and Sten Thordarson.

In violation of Title 29, United States Code, Section 501(c) and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 9

[29 U.S.C. §501(c) and 18 U.S.C. §2]

That from on or about September 2, 1978, to on or about November 30, 1978, in the Central District of California, and elsewhere,

CRAIG DUNBAR,
STEN THORDARSON, and
CHARLES WISE,

defendants herein, each being an officer and employee of Teamster Union Local 389 as described in Count 6 of this indictment, each aiding and abetting the other, did embezzle, steal and unlawfully and wilfully abstract and convert to their own use and the use of another, monies, funds, property and assets of Teamster Union Local 389, by authorizing and utilizing union funds for expenses and reimbursement of expenses incurred in a trip from California to Connecticut for the unlawful purpose of loca-

ting and destroying by arson a Redman truck, said expenses described as follows:

a. Thirteen dollars and fifteen cents ($13.15) for a gasoline purchase made by Craig Dunbar on Local 389's Mobil Oil credit card on or about September 2, 1978, which expense was included in and paid for by Local 389's check dated November 30, 1978, signed and authorized by Sten Thordarson and Charles Wise.

b. Eight dollars and twenty-five cents ($8.25) for a gasoline purchase made by Craig Dunbar on Local 389's Chevron Oil credit card on or about September 6, 1978, which expense was included in and paid for by Local 389's check dated November 30, 1978, signed and authorized by Sten

Thordarson and Charles Wise.

c. Twelve dollars ($12.00) for a gasoline purchase made by Craig Dunbar on Local 389's Chevron Oil credit card on or about September 6, 1978, which expense was included in and paid for by Local 389's check dated November 30, 1978, signed and authorized by Sten Thordarson and Charles Wise.

d. Long distance telephone toll expenses incurred by Craig Dunbar and charged to Local 389's Pacific Telephone Co. credit card which expenses were included in and paid for by Local 389's check dated October 30, 1978, and signed and authorized by Sten Thordarson and Charles Wise.

All in violation of Title 29, United

States Code, Section 501(c) and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES:

COUNT 10

[29 U.S.C. § 501(c) and 18 U.S.C. § 2]

On from or about September 1, 1978, to on or about October 27, 1978, in the Central District of California, and elsewhere,

CRAIG DUNBAR,
MARTIN FRY, and
MARTIN SALGADO

defendants herein, Craig Dunbar being an officer of Teamster Union Local 389 and being indirectly employed by Teamster Union Local 186, Martin Fry being an officer and employee of Local 186, that is as Secretary-Treasurer and Martin Salgado being employed by Local 186 as trustee-business agent, each aiding and abetting the other, did embezzle, steal and unlawfully and wilfully abstract and convert to their own use and the use of another, monies, funds,

property, and assets of Teamsters Union Local 186, by authorizing and utilizing union funds for expenses and reimbursement of expenses incurred in a trip from California to New York and Connecticut for the unlawful purpose of locating and destroying by arson, a Redman truck, said expenses described as follows:

a. Approximately two hundred and eighty-seven dollars and twenty-eight cents ($287.28) paid by Union check in that amount dated September 1, 1978, and signed by Martin Fry and payable to Martin Salgado, which check was endorsed in the name of Martin Salgado by Martin Fry and given to Craig Dunbar for deposit into Dunbar's personal checking account.

b. Approximately two hundred and sixty-nine dollars and eighty-

eight cents ($269.88) paid by Union check in that amount dated September 1, 1978, and signed by Martin Fry which check was made payable to John Evans, given to Craig Dunbar and deposited into Dunbar's personal checking account with the check described above in paragraph a., minus two hundred dollars ($200.00) in cash.

c. Fourteen dollars ($14.00) for a gasoline purchase made by Martin Salgado on Local 186's Atlantic Richfield Oil Company credit card on or about September 2, 1978, which expense was included in and paid for by Local 186's check dated October 27, 1978, and signed by Martin Fry.

A True Bill:

_____
Foreman

_____
United States Attorney

Opposition

Office - Supreme Court, U.S.
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OCT 23 1981

No. 81-643

In the Supreme Court of the United States

OCTOBER TERM, 1981

STEN THORDARSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-643

STEN THORDARSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that their indictment should be dismissed on the ground that union officials and employees may not be prosecuted under federal criminal statutes for wrongful acts committed during a union strike.

Petitioners, union officials and employees of Teamsters' locals, were charged in a ten-count indictment returned in the United States District Court for the Central District of California with various crimes growing out of the destruction of property of the Redman Moving and Storage Company, a company against whom the locals were striking. Counts 2 and 3 charged petitioners with the use of explosives to damage vehicles used in interstate commerce, in violation of 18 U.S.C. 844(i); counts 4 and 5 charged travel in interstate commerce to commit arson, in violation of the Travel Act, 18 U.S.C. 1952; counts 6 through 10 charged conversion of union funds, in violation of 29 U.S.C. 501(c);

and count 1 charged a conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d) (Pet. App. E). The district court dismissed counts 1 through 5 on the ground that the applicable statutes do not extend to violent activities occurring during strikes (Pet. App. 76-89, 101-102). The district court dismissed counts 6 through 10 for failure to allege essential elements of the offense under 29 U.S.C. 501(c), particularly a fraudulent intent to deprive the union of its funds and either a lack of union authorization or an absence of good faith belief in benefit to the union (Pet. App. 89-101). The court of appeals reversed, one judge dissenting as to the reversal of the district court's order dismissing counts 1 through 5 (Pet. App. 1-73).

Petitioners contend (Pet. 11-36) that the court of appeals erred in reinstating the indictment. They argue, relying on *United States* v. *Enmons*, 410 U.S. 396 (1973), that wrongful acts done to further the objectives of a labor union pursuing a legitimate labor goal fall outside the scope of all federal criminal laws. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to dismiss the indictment. If petitioners are acquitted following a trial on the merits, their claims will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their present contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Arroostook R.R.*, 389 U.S. 327 (1967); *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S.

372, 384-388 (1893); see *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916). Cf. *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1981

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[1]Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1981-10

Amicus Brief

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No. 81-643

Supreme Court of the United States

OCTOBER TERM, 1981

STEN THORDARSON, MARTIN FRY, CRAIG DUNBAR, MARTIN SALGADO and CHARLES WISE,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Appeal from the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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Supreme Court of the United States

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

INTEREST OF THE *AMICUS CURIAE*

This brief amicus, in support of the position of Sten Thordarson, Martin Fry, Craig Dunbar, Martin Salgado and Charles Wise, is filed, with the consent of the parties as provided for in Rule 36 of the Rules of this Court, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor

organization with 741 affiliated local labor unions having a membership of approximately two million working men and women. It is the largest and most diverse labor organization in the United States. Its affiliated local unions represent American workers in every phase of the economy for purposes of collective bargaining with their employers. Accordingly, the International Union has a deep interest in the laws delineating the framework of the labor relations system and those which impact upon the rights of unions and their members within that system.

The decision of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Thordarson*, 646 F.2d 1323 (1981), reinstates an indictment alleging that certain acts performed in the context of a labor dispute, and which were intended to further the legitimate goals of the union involved in that dispute, violate federal criminal statutes. Previously, application of the federal criminal statutes in the area of labor-management relations has been narrowly limited, based upon precise Congressional authorization to control specific activity. The penalties provided by those statutes have been carefully drafted so as to avoid discouraging unions and their members from exercising their right to take concerted activity in furtherance of their legitimate goals. Acceptance of the Ninth Circuit's extensive imposition of the federal criminal system upon the labor-management realm, complete with the severe penalties designed without regard to the effect they may have on the exercise of other legitimate rights, is inconsistent with the carefully constructed labor system as well as with the intended use of those criminal statutes.

The International Union and its affiliated local unions and members, active participants in the existing system of labor-management relations, have an interest in preserving that process which merits the consideration of its

views by this Court. In supporting the petition for certiorari and urging reversal of the Ninth Circuit's decision, the amicus does not support, ratify or condone the activities allegedly committed in this case. Nor does the amicus assert that any and all violence committed during a labor dispute be immune from criminal prosecution merely because it was intended to achieve a legitimate objective. Rather, the amicus urges that random acts of violence continue to be the responsibility of state, rather than federal, law enforcement authorities.

SUMMARY OF ARGUMENT

The use of the federal criminal system to prosecute union officials and members for random acts of violence which occur in the midst of a labor dispute and which are intended to further legitimate union goals distorts the federal criminal statutes by utilizing them in areas other than those which Congress intended and in a manner which is inconsistent with the existing labor relations structure. The decision of the United States Court of Appeals for the Ninth Circuit subjects union members and officials to federal criminal prosecution for acts which were previously left to the state criminal processes and imposes severe penalties for isolated actions which are part of otherwise lawful efforts to accomplish goals legitimatized by the federal labor laws. In this regard, the Ninth Circuit's decision ignores this Court's rationale in *United States* v. *Enmons*, 410 U.S. 396 (1973). It is also inconsistent with decisions of other Circuit Courts of Appeals which have held that federal criminal statutes may only be applied in the labor relations area in those limited situations in which Congress has legislated with the specific intent of supplementing inadequate state procedures.

ARGUMENT

The Federal Criminal Statutes At Issue Were Not Intended To Control Random Acts of Violence

Sections 1952 and 1962 of Title 18, U.S.C., were enacted to confront the growing menace of organized crime and racketeering. Section 1952 was specifically intended to reach "racketeers living in one State and controlling the rackets and reaping the profits from those rackets located in another State." H.R. Rep. No. 966, 1961 U.S. Code Cong. & Admin. News, p. 2665. Section 1962 was part of Title IX of the Organized Crime Control Act of 1970, entitled "Racketeer Influenced and Corrupt Organizations." It was enacted to prevent and punish the financial infiltration and corrupt operation of "legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity." *Iannelli* v. *United States*, 420 U.S. 770, 787 n. 19 (1975); H.R. Rep. No. 91-1549, 1970 U.S. Code Cong. & Admin. News, p. 4010. Both Sections 1962 and 844 of Title 18 were included in the Organized Crime Control Act of 1970, and constitute segments of the statutory scheme seeking "the eradication of organized crime in the United States...." Pub. L. No. 91-452, 1970 U.S. Code Cong. & Admin. News, p. 1073. The target of these measures was a special class of criminals who, on a continuing basis, "operate illegitimately in legitimate channels." 116 Cong. Rec. 8671 (1970); *United States* v. *Sutton*, 605 F.2d 260 (6th Cir. 1979). They were intended to reach entrenched criminal operations, especially major gambling activities, not sporadic or isolated unlawful activity. *Id.* at 270; *Iannelli* v. *United States*, *supra*, 420 U.S. at 787; *United States* v. *Teemer*, 214 F. Supp. 952, 958 (N.D. W.Va. 1963); S. Rep. No. 91-617, 91st Cong., 1st Sess., p. 73 (1969).

Moreover, the entire thrust of the federal criminal scheme created by Congress is to extend federal jurisdiction only to those engaged in illegal activities of "major proportions", leaving the States to deal with "small-scale" activities which "pose a limited threat to federal interests." *Iannelli* v. *United States*, *supra*, 420 U.S. at 790. Thus, Section 1962 is intended to exert federal authority over activities which form a "pattern" of "racketeering activity" in furtherance of an "enterprise."

But the history of industrial violence in this country discloses only isolated and unplanned acts.[1] Such random acts of violence have historically been left to the control of the States. The wilfull commission of industrial violence is a crime in every state and the States have fashioned criminal procedures to deal with it severely, in keeping with the States' principal responsibility for defining and prosecuting crimes. *Abbate* v. *United States*, 359 U.S. 187, 195 (1959).

The strong disinclination against sweeping within the federal criminal law conduct which is traditionally within the mainstream of state criminal law is greatly reinforced in the area of industrial violence by the explicit and affirmative direction of Congress expressed in the Norris-LaGuardia Act.[2] That Act reflects the general Congressional approach to the labor-management relations system; namely, that the role of the federal judiciary be limited except in specifically prescribed circumstances. *Marine Cooks and Stewards, A.F.L.* v. *Panama S.S. Co.*, 362 U.S. 365, 367-370 and n. 7 (1960). The prohibition against the issuance of an injunction by a

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[1] P. Taft and P. Ross, American Labor Violence: Its Causes, Character and Outcome, 291, in H. Graham and T. Gurr, Violence In America: Historical And Comparative Perspectives, A Report to the National Commission On The Causes and Prevention of Violence (June 1969).

[2] 29 U.S.C. § 101 (1964).

federal court in a labor dispute does not extend to conduct involving "fraud or violence" (§ 4(e), (i)). But before an injunction barring violence may issue, the federal court is required to find *inter alia* that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection" (§ 7(e)). A breakdown in state protection is, therefore, the indispensable precondition to federal intervention even in the civil area.[3] Congress could hardly have intended the statutes at issue here to be utilized to reach industrial violence, with the imposition of the severe criminal penalties they provide, when it refuses to brook even civil interference where adequate state protection is available. Cf., *United States* v. *Hutcheson*, 312 U.S. 219, 234-235 (1941).

Section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, further evidences Congressional concern that labor organizations not be subject to criminal prosecution for random acts by limiting a union's liability for unlawful conduct to instances in which it could be established, by "clear proof," that the conduct was authorized, ratified or participated in by the union. This Court has recognized the special protections afforded by Congress to labor unions in order that they may perform their statutory functions by defining the "authorization" which might subject a labor union to criminal liability as "something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment." *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 406 (1947). The "authorization" in the labor context must be much more explicit, a requirement which protects unions from li-

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[3] E.g., *Cimarron Coal Corp.* v. *District No. 23, U.M.W.*, 416 F.2d 844 (6th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *Donnelly Garment Co.* v. *Dubinsky*, 154 F.2d 38 (8th Cir. 1946).

ability for the independent acts of their members and officers.

Where Congress has legislated to supplement the state statutes regulating orderly union conduct, it has done so in explicit terms.[4] And while Congress has provided federal criminal penalties for conduct which is unrelated to the achievement of legitimate union goals,[5] it has deliberately refused to sweep within the federal criminal ambit violent acts which occur in furtherance of legitimate objectives. *United States* v. *Enmons*, *supra*, 410 U.S. at 404.

The Ninth Circuit's decision in this case would limit the *Enmons* rationale to cases arising under the Hobbs Act, 18 U.S.C. § 1951, the statute at issue there. *United States* v. *Thordarson*, *supra*, 646 F.2d at 1327. That holding ignores the fact that when Congress enacted the Hobbs Act to close a perceived loophole in the Anti-Racketeering Act of 1934, 48 Stat. 979, it considered the entire scope of industrial violence and specifically chose not to impose federal criminal sanctions on activities intended to achieve legitimate union objectives. *United States* v. *Enmons*, *supra*, 410 U.S. at 404-405 n. 12-14; *United States* v. *Caldes*, 457 F.2d 74, 76-77 (9th Cir. 1972); *United States* v. *Quinn*, 514 F.2d 1250, 1257 (5th Cir. 1975). The Ninth Circuit's decision in this case also discounts its pre-*Enmons* conclusion that "Congress did not intend [the Hobbs Act] to eliminate traditional labor or union activity, albeit militant, which has as its objectives legitimate ends . . ." because "it does not appear that Congress intended that acts of violence which are the by-product of frustration en-

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[4] E.g., 29 U.S.C. § 158(b)(1)(A). See *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656, 668-669 (1954).

[5] E.g., 29 U.S.C. § 501(c); 29 U.S.C. § 530.

gendered by a prolonged, bona fide collective bargaining negotiation to be 'extortion' within the meaning of the [Hobbs] Act." *United States* v. *Caldes*, *supra*, 457 F.2d at 76, 78. The Ninth Circuit, in permitting the federal government to utilize the criminal statutes at issue here to punish behavior similar to that specifically exempted from the federal criminal sphere by *Enmons* and *Caldes*, would permit conduct in pursuit of a legitimate goal to become a path to prison. The federal criminal procedures cannot function in such a fashion. *United States* v. *Hutcheson*, *supra*, 312 U.S. at 234-235.

Rather, the statutes at issue here must be viewed as an integral part of the federal criminal scheme, a system which includes the Hobbs Act. As statutes pertaining to the same subject, they must be construed "as if they were one law." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). It is an axiom of statutory construction that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject. *Id.* at 244. Thus, given the explicit Congressional intent to exclude violent acts conducted in furtherance of legitimate union goals from the scope of the Hobbs Act, and in the absence of a clear expression of Congressional intent to modify the existing statutory scheme, there is no basis for concluding, as the Ninth Circuit has, that the Congress intended the subsequently enacted statutes at issue here to be construed as criminalizing that which had previously been legal.[6]

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[6] The Ninth Circuit improperly placed the burden on the defendants to establish that their alleged activities were exempted from the statutes at issue, *Thordarson*, *supra*, 646 F.2d at 1327. Rather, the burden should rest with the Government to demonstrate that an expansive reading of the statutes is appropriate. *United States* v. *Resnick*, 299 U.S. 207, 209 (1936); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *United States* v. *Enmons*, *supra*, 410 U.S. at 411-412.

Imposition of Federal Criminal Penalties Will Inhibit Legitimate Union Activity

The extension of the criminal statutes in this case into the labor-management arena would have a chilling effect upon the right of union members to engage in collective, concerted activity to achieve legitimate goals. Even the Ninth Circuit recognized that utilization of the Hobbs Act to punish violence intended to achieve legitimate union objectives would subject union members to penalties which were so severe as to significantly deter their willingness to exercise rights protected by the National Labor Relations Act. *United States* v. *Caldes*, *supra*, 457 F.2d at 78. That result is no less likely if the prosecution were under the statutes employed by the government in this case. It is inconceivable that Congress intended to create a labor relations system which protects an individual's right to engage in collective activity yet which subjects the individual who exercises that right to criminal prosecution.[7]

In recognition of the special attention paid by Congress to the labor-management system, this Court has held that the federal government cannot extend its criminal jurisdiction to assume responsibility for policing the orderly conduct of labor disputes absent a clear statement of Congressional intent. *United States* v. *Enmons*,

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[7] The contention that the Congress did not intend the statutes at issue here to extend to acts of violence committed in furtherance of a legitimate union objective is buttressed by the current bills pending in Congress seeking to legislate in this area. No fewer than three bills have been proposed which would extend the federal criminal system by either revoking the Hobbs Act's exemption for activity which seeks a legitimate goal (H.R. 450 and S. 613, 97th Cong., 1st Sess. (1981)) or by criminalizing "any act of violence or threat of violence in a labor dispute . . ." (H.R. 115, 97th Cong., 1st Sess. (1981)). Two additional bills seek to broaden the concept of "extortion" beyond its present Hobbs Act definition. (H.R. 1647 and S. 1630, 97th Cong., 1st Sess. (1981)).

supra, 410 U.S. at 411. See *United States* v. *DeLaurentis*, 491 F.2d 208 (2d Cir. 1974). Even in the application of criminal statutes, the special status of labor matters has been acknowledged. *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979). That sensitivity merits application here since the adverse consequences on the labor relations system of utilizing the statutes at issue in this case to reach violent acts intended to achieve legitimate objectives are identical to those considered by the Court in *Enmons*.

Specifically, the severe penalties imposed for violating the statutes at issue would diminish the militancy of the labor union movement. Even in the instances that Congress has specifically legislated criminal penalties for union misconduct, the sanctions have been much less severe than those provided in the statutes here.[8] And the more traditional method of dealing with industrial misconduct has been to permit the National Labor Relations Board to fashion remedies which are appropriate for the particular circumstances. *United States* v. *DeLaurentis*, *supra*, 491 F.2d at 213 and n.15. In fashioning those remedies, the National Labor Relations Board has consistently recognized the adverse impact on the exercise of protected concerted activities of awards of monetary damages against unions. *Union de Tronquistas, Local 901*, 202 N.L.R.B. 399, 400 (1973). Similar considerations have led this Court to preclude imposition of punitive damages upon unions for undertaking their statutory obligation to represent their members, *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), as well as in a wide variety of other circumstances. *Id.* at 52.

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[8] 29 U.S.C. § 530 provides for a maximum fine of $1,000 and a maximum prison term of one year, in stark contrast to 18 U.S.C. § 844(i) which prescribes fines of $10,000-$20,000 and imprisonment for 10 years to life, and includes the death penalty. 18 U.S.C. § 1952 provides a fine of $10,000 and a prison term of five years.

Clearly, the threat of the imposition of the severe criminal sanctions provided by the statutes in this case would interfere with the policies and activities protected by the National Labor Relations Act to a far greater extent than the monetary penalties eschewed by the Board and this Court, and increase the risk incurred by exercising the rights guaranteed by Sections 7 and 13[9] of the Act to such a degree as to render them meaningless.

CONCLUSION

For the reasons stated herein, as well as those previously given by Petitioners, it is urged that the petition for certiorari be granted and the decision of the United States Court of Appeals for the Ninth Circuit be reversed. Such action will not immunize violence in the labor relations system, but will leave responsibility for the maintenance of civil order in the hands of the State authorities, where it has historically resided and where it still belongs.

Respectfully submitted,

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[9] 29 U.S.C. §§ 157, 163.